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MILITARY LAW.

BY

LIEUTENANT COLONEL W. WINTHROP,

DEPUTY JUDGE ADVOCATE GENERAL, U. S. ARMY,

AUTHOR OF THE ANNOTATED DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL.

IN TWO VOLUMES—VOL. I.

W. H. MORRISON,
LAW BOOKSELLER AND PUBLISHER.
WASHINGTON, D. C.
1886.

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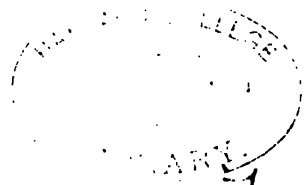

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21

TO

BVT. MAJOR GENERAL JOSEPH HOLT, U. S. A.,

SECRETARY OF WAR IN 1860–1861,

WHO, LATER, AS THE

FIRST JUDGE ADVOCATE GENERAL OF THE ARMY,

AT THE MOST CRITICAL PERIOD OF OUR HISTORY,

FOUNDED OUR MILITARY JURISPRUDENCE,

THIS WORK IS,

WITH RESPECT AND AFFECTION,

DEDICATED,

BY HIS FORMER ASSISTANT.

PREFACE.

In view of the absence and want of a comprehensive treatise on the science of Military Law, it has been for some years the purpose of the author—a member of the bar in the practice of his profession when, in April, 1861, he entered the military service—to attempt to supply such want with a work, which, by reason of its extended plan and full presentation of principles and precedents, should constitute, not merely a text book for the army, but a *law book* adapted to the use of lawyers and judges. The present treatise was substantially completed in 1880, when the author was called upon to publish his "Digest of Opinions of the Judge Advocates General," and some of the references embraced in the original work were inserted in the notes of that publication. Since its date certain unusually important military trials and investigations have been had, sundry valuable opinions upon questions of military law have been pronounced by the courts and other legal authorities, and our written military law—especially the Army Regulations—has been materially modified. Meanwhile also, in England, the time-honored Mutiny Act and Articles of War have wholly passed away and been succeeded by the new "Army Act" and "Rules of Procedure,"—a reform of great interest to the military student,—and this legislation, &c., has been copiously illustrated by the excellent official "Manual of Military Law" and a series of minor commentaries.

In view of these changes, the present work has been revised, and in great part re-written, and the references have been brought down to the end of the year 1885. Apart from the views and conclusions of the author, the precedents, now first collected and considered, will, it is believed, be found to be valuable both as law and history. A complete history, for ex-

ample, of the late war could scarcely be written without ta-ing into consideration the more important trials and acts c military government of that period instanced in the course c these volumes.

The author, however, will be fully recompensed for his labo if the same shall result in inspiring an interest in the study c Military Law as a department of legal science not heretofoı duly recognized. The lawyer who, if he has not been led int the old error of confounding the military law proper with mar tial law, has perhaps viewed it as consisting merely of an un important and uninteresting scheme of discipline, will, it i hoped, discover in these pages that there is a military code of greater age and dignity and of a more elevated tone than any existing civil code, as also a military procedure, which, by its freedom from the technical forms and obstructive habits that embarrass and delay the operations of the civil courts, is enabled to result in a summary and efficient administration of justice well worthy of respect and imitation. The military student, on the other hand, in examining the cases cited, as adjudicated by the courts which expound the international law, the common law, the criminal law, and the maritime law, will, it is thought, more fully appreciate the connection between the military law and the general law of the land;—will perceive that the former, while distinct and individual, is not an isolated exception, but a branch of the great body of the public law, variously and harmoniously affiliated with the other branche of the system.

That Military Law, from its early origin and historical asso ciations, its experience of many wars, its moderation in time o peace, its scrupulous regard of honor, its inflexible discipline its simplicity, and its strength, is fairly entitled to consideratio and study, is a belief of the author which he trusts his reade will share.

CONTENTS.

CHAPTER I.

PAGE

THE SUBJECT DEFINED AND DIVIDED—CONSTITUTIONAL PROVISIONS 1

CHAPTER II.

THE WRITTEN LAW—ARTICLES OF WAR AND OTHER DISCIPLINARY STATUTES 4

CHAPTER III.

ARMY REGULATIONS AND ORDERS 17

CHAPTER IV.

THE UNWRITTEN MILITARY LAW 41

CHAPTER V.

THE COURT-MARTIAL—ITS HISTORY AND NATURE 46

CHAPTER VI.

THE CONSTITUTION OF GENERAL COURTS-MARTIAL 61

CHAPTER VII.

THE COMPOSITION OF GENERAL COURTS-MARTIAL 80

CHAPTER VIII.

THE JURISDICTION OF GENERAL COURTS-MARTIAL 95

CHAPTER IX.

PAGE
THE PROCEDURE OF GENERAL COURTS-MARTIAL—ARREST..... 153

CHAPTER X.

THE CHARGE..... 170

CHAPTER XI.

THE FORMAL ORDERING, MEETING, &C., OF THE COURT..... 209

CHAPTER XII.

THE PRESIDENT AND MEMBERS..... 226

CHAPTER XIII.

THE JUDGE ADVOCATE..... 240

CHAPTER XIV.

CHALLENGES..... 279

CHAPTER XV.

ORGANIZATION—ARRAIGNMENT—CONTINUANCE—NOLLE PROSEQUI..... 318

CHAPTER XVI.

PLEAS AND MOTIONS..... 345

CHAPTER XVII.

THE TRIAL:—HOURS OF SESSION—OPENING—COURSE OF PROCEEDINGS—DEFENCE—STATEMENT—CONTEMPT..... 394

CHAPTER XVIII.

EVIDENCE..... 442

CHAPTER XIX.

PAGE
THE FINDING 529

CHAPTER XX.

SENTENCE AND PUNISHMENT 549

CHAPTER XXI.

ACTION ON THE PROCEEDINGS—THE REVIEWING AUTHORITY .. 632

CHAPTER XXII.

INFERIOR COURTS-MARTIAL AND MILITARY BOARDS 682

CHAPTER XXIII.

THE RECORD 709

CHAPTER XXIV.

COURTS OF INQUIRY 729

CHAPTER XXV.

THE ARTICLES OF WAR SEPARATELY CONSIDERED 756

EXPLANATION OF REFERENCES.

The well known military writers, or authors of works on military or naval law or history, are generally cited simply by name—as Bruce, Adye, Sullivan, Grose, Williamson, Tytler, McArthur, Samuel, Delafons, McNaghten, Simmons, Harcourt, Griffiths, Kennedy, Napier, Hughes, Hickman, D'Aguilar, Prendergast, Thring, Tulloch, Franklyn, Gorham, Jones, O'Dowd, Brackenbury, Pratt, Macomb, Maltby, O'Brien, De Hart, Coppée, Benét, Lee, Harwood, Ives.

Hough's principal work on Courts-Martial, published in 1825, is referred to as—Hough.

His "Practice of Courts-Martial and other Military Courts," (1834,) as—Hough, (Practice.)

His "Military Law Authorities," (1839,) as—Hough, (A.)

His "Precedents in Military Law," (1855,) as—Hough, (P.)

Clode's "Military Forces of the Crown," (2 vols.,) is referred to as—Clode, 1 (or 2) M. F.

His "Administrtion of Justice under Military or Martial Law," as—Clode, M. L.

James' "Collection of the Charges, Opinions and Sentences of General Courts-Martial," is referred to as—James.

"A Letter to the Queen on a late Court-Martial," by Samuel Warren, is referred to as—Warren.

The "Rules for the guidance of Courts-Martial in the Bombay Army," is referred to as—Bombay R.

The "Manual of Military Law" by Col. J. K. Pipon and J. F. Collier, Esq., is referred to as—Pipon & Col.

The official "Manual of Military Law," the work of some seven different writers, revised by the Judge Advocate General, and published by the British War Office, Oct. 1st, 1882, is referred to as—Manual.

The French "Manuel Pratique des Tribunaux Militaires," by P. Alla, is referred to as—Alla.

The edition referred to of the Journals of (the Continental) Congress, is that published by Way & Gideon, Washington, 1823.

The Military Dictionaries referred to are specifically indicated as those of Voyle, Duckett, Campbell, Duane, Scott, &c.

The numerous military Trials or Inquiries referred to are chiefly the printed proceedings contained in volumes to be found in the law library at the Capitol, Washington, and other law or general libraries. Others are to be found, and are cited as published, in the "American Archives" or "State Papers." Of others, which exist only in the original records on file in the Judge Advocate General's Department, the proceedings have generally been published in specified General Orders.

The Orders of the War Department or Headquarters of the Army, [including the earlier O., (A. & I. G. O.,) which were dated but not numbered,] are in general referred to simply as G. O. or G. C. M. O., of such a year, &c., *without adding* "*War Dept.*," *or* "*Hdqrs. of Army.*" They are *thus distinguished* from the G. O. and G. C. M. O. of the military Departments, &c., in citing which the name of the specific Dept., Division, Army, &c., is always given.

The previous work of the present author—the "Digest of Opinions of the Judge Advocates General"—is referred to simply as—DIGEST.

MILITARY LAW.

CHAPTER I.

THE SUBJECT DEFINED AND DIVIDED—CONSTITUTIONAL PROVISIONS.

MILITARY LAW, in its ordinary and more restricted sense, is the specific law governing the Army[1] as a separate community.

In a wider sense, it includes also that law, which, operative only in time of war or like emergency, regulates the relations of enemies and authorizes *military government* and *martial law*.

The general subject of Military Law will therefore naturally be presented under two Parts, as follows:

Part I. Military Law Proper.
Part II. The Law of War.

But a treatise on Military Law can scarcely be complete, or satisfactory to the military profession, without some reference to the *quasi* civil functions which may be devolved upon the army and to the legal relations in which its members may be placed toward the civil community. A further Part has therefore been added to this work, entitled—

Part III. Civil functions and relations of the Military.

---

1. Military Law, or the "Law Military," in its most comprehensive sense, may be deemed to embrace the law governing the *Navy*. This law, however, it is not proposed to advert to except in so far as its provisions or principles may illustrate those of the law pertaining to the Army, or affect the status of the Marine Corps when serving with the Army. For the distinctive features of our naval code, reference may be had to Title XV of the Revised Statutes, the U. S. Navy Regulations, ed. of 1881, the Gen. Ct. Mar. Orders of the Navy Department, which have been issued regularly since February, 1879, and Commodore Harwood's treatise on Naval Courts Martial, published in 1867.

SOURCE OF AND AUTHORITY FOR MILITARY LAW IN GENERAL.

Historically, as will hereafter be indicated, our military law is very considerably older than our Constitution. With the Constitution, however, all our public law began either to exist or to operate anew, and this instrument therefore is in general referred to as the source of the military as well as the other law of the United States. Thus it is said by Chief Justice Chase, in *Ex-parte* Milligan[1]:—"The Constitution itself provides for military government as well as for civil government. * * * There is no law for the government of the citizens, the armies, or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution."

Specific Constitutional Provisions. The provisions of the Constitution which may be regarded as the source or sanction of, or authority for, our existing military law and jurisdiction—the discipline of armies as well as the war power—are the following, viz.:

1st. Those by which CONGRESS, as the *legislative* branch of the government is empowered—"To define and punish * * * offences against the law of nations;" "To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;" "To raise and support armies;" "To provide and maintain a navy;" "To make rules for the government and regulation of the land and naval forces;" "To provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions;" "To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States;" and further, generally, "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers," (*i. e.* those here recited together with various others set forth in the same section,) "and all other powers vested by this Constitution in the government of the United States or in any department or officer thereof."[2]

2d. Those by which the PRESIDENT, as the *executive* power,

1. 4 Wallace, 137.
2. Const., Art. I, Sec. 8.

is constituted "Commander-in-Chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States;" by which he is empowered to appoint, (generally in conjunction with the Senate,) and is required to commission, the officers of the army, &c.; and by which it is made his duty to "take care that the laws be faithfully executed."[1]

3d. The provision of the Vth Amendment, that—"No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

These provisions[2] will be variously applied and illustrated in the several Parts of the work.

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1. Const., Art. II, Secs. 1, 2 and 3.

2. With those cited may also be noticed Art. III of the Amendments, prescribing that:—"No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law." The billeting of soldiers, however, is practically unknown in our army.

CHAPTER II.

PART I—MILITARY LAW PROPER.

THE WRITTEN LAW—ARTICLES OF WAR AND OTHER DISCIPLINARY STATUTES.

Military law proper—Of what it consists. Military law proper is that branch of the public law which is enacted or ordained for the government exclusively of the military state, and is operative equally in peace and in war. We will term it, in general, simply *military law*, in contradistinction to the law administered by the civil tribunals. Like that law, it consists of a Written and Unwritten law.

The Written military law. This, which comprises much the greater part of the Law to be considered, is made up of:—

I. The statutory Code of Articles of War; II. Other statutory enactments relating to the discipline of the Army; III. The Army Regulations; IV. General and Special Orders.

I. THE ARTICLES OF WAR.

The Articles, or Rules and Articles, of War, are statutory provisions for the enforcement of discipline and administration of criminal justice in the army, enacted by Congress in the exercise of the constitutional power "to make rules for the government and regulation of the land forces." In their origin, however, a majority of these Articles considerably *pre-date* the Constitution, being derived from those adopted by the Continental Congress between 1775 and 1786, which were themselves taken from pre-existing British articles having their inception in remote antiquity.

Early Codes. While no written military codes remain from the times of the Greeks or Romans, some of the principal military offences familiar to our present law, as desertion, mutiny,

cowardice, the doing of violence to a superior, and the sale or appropriation of arms, were recognized in their armies; and, of the punishments inflicted by them, while a portion, such as decimation,[1] denial of sepulture, (in connection with the death penalty,) maiming, exposure to the elements, taking of meals standing, &c., have long ceased to be known, others, such as dishonorable discharge, expulsion from the camp, labor on the fortifications, carrying of burdens, and servile or police duty, have come down to our day without substantial modification. Among the early Germans, in the absence of a written law, justice was in general administered summarily by the chief commanders, through the instrumentality of the priests; the principal punishments, besides death, being whipping, forfeiture of horses or cattle, and a civil and military disqualification or dishonoring imposed for such offences as volunteering for a campaign but failing to take the field, losing the shield in battle, and returning alive from a battle where the chief had fallen.

Of the written military laws of Europe the first authentic instance appears to have been those embraced in the Salic code, originally made by the chiefs of the Salians at the beginning of the fifth century, and revised and matured by the successive Frankish kings: other written laws—as those of the Western Goths, the Lombards, the Burgundians and the Bavarians, extending in date to the ninth century, belong to this period. These codes were all civil as well as military, the civil and military jurisdictions being scarcely distinguished and the civil judges being also military commanders in war.[2]

The date of the first French *ordonnance* of military law is given as 1378; the first German *Kriegsartikel* are attributed to 1487. The laws however of the Merovingian and Carlovingian Franks appear to have reached their full development in 1532 in the celebrated penal code of the Emperor Charles V, which has been viewed as the model of the existing military codes of con-

1. See Chapter XX, p. 618.

2. Among the principal authorities consulted upon the subject of these early military laws are Potters' Archæologia Græca; Smith's Dictionary of Greek and Roman Antiquities; Adam's Roman Antiquities; Vegetius, De Re Militari; Ludovici, Kriegsprocess; Koppmann, Militärstrafgesetzbuch; Von Molitor, Kriegsgerichte und Militärstrafen; Le Faure, Lois Militaires de la France; Foucher, Commentaire sur le Code de la Justice Militaire.

tinental Europe. The Articles of War of the Free Netherlands of 1590, republished in 1705; the elaborate Articles of Gustavus Adolphus framed in 1621; the Regulations of Louis XIV, of 1651 and 1665; the Articles and Regulations of Czar Peter the Great, of 1715; and the Theresian penal code of the Empress Maria Theresa, of 1768, with the later "Norma"—are among the most noted of the systems of European military law which have succeeded the "Carolina."[1] Some of the details of these laws will be hereafter referred to.

The British Military Code. For nearly two centuries, and till a very recent date, this parent code was made up of—(1) the statute known as the Army Mutiny Act, and (2) the Articles of War.

The early Articles. The Articles are much older in history than the statute. The earliest articles appear to have been specific military orders or directions issued to the army, for its government, when about to proceed upon an expedition, or from time to time during war.[2] They were commonly ordained directly by the King, by virtue of his royal prerogative, and with the aid and counsel of his peers, especially of the High Constable and Earl Marshall,[3] officials hereafter to be referred to as composing the court of chivalry, the original of the court-martial in England.[4] Early ordinances of this character are referred to by the authorities as promulgated by Richard I,[5] Richard II,[6] Henry V,[7] Henry VII, and Henry VIII:[8] these were succeeded by more extended precepts which continued to be put forth by the Crown, or by its authority, till the period of the Rebellion; those of 1629

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1. The more usual designation of the code of Charles V; the full description being "Constitutio Carolina Criminalis."

2. 2 Grose, 58; Pipon & Col., 14; Clode, M. L., 29, 72. As to the early history of *naval* military law prior to the Act of 13 Chas. II, "which brought the naval usages and ordinances into the form of a statute," see Forsyth, Cases & Opins. of Const. Law, 193-4.

3. 2 Grose, 58; Adye, 5; Tytler, 38; Samuel, 61; Griffiths, 18.

4. See Chapter V.

5. 2 Grose, 63; Samuel, 60, 89. And see Appendix.

6. These "Statutes, Ordinances, and Customs," of Richard II, (A. D. 1385,) as given by Grose, vol. 2, pp. 64-69, will be found in the Appendix.

7. These contain "regulations respecting duties, musters, watches, and guards," &c. 2 Grose, 70. And see Samuel, 90; Pratt, 3.

8. 2 Grose, 70; Samuel, 59-63; Pipon & Col., 14.

and 1639 being the most elaborate.[1] In some instances the generals commanding the armies were empowered by the King, by special commission, to make rules and articles of war.[2] Among the last of these was the ordinance issued in 1640 by the Earl of Northumberland as Lord General,[3] which was followed by a similar one, (of ninety-six articles under twelve heads,) promulgated in 1642 by the Earl of Essex as commander of the opposing army of parliament and with the sanction of that body.[4]

Just before the dates last mentioned, viz. in 1639, there was published in London[5] the Code of Articles, already referred to, of Gustavus Adolphus, promulgated by him to his army in July, 1621. In reading these, (one hundred and sixty-seven in number,) it is readily concluded that not a few of the articles of the English codes of a later date were shaped after this model or suggested by its provisions.[6] In some instances, in our own present articles, there are retained quaint forms of expression identical with terms to be found in this early code as translated.

Subsequently to the Rebellion, articles were put forth, from time to time, by the Crown or under its authority, during the

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1. Clode, M. L., 9–11. The articles of 1639, as contained in Clode, 1 M. F., 429–440, are ninety in number and arranged under six separate titles.

2. 2 Grose, 58–59; Samuel, 64; Clode, M. L., 6, 10; also Id., 2 M. F., 425, where is given in full the commission of Chas. I to the Earl of Arundel as commander-in-chief, under which were issued the articles of 1639.

3. 2 Grose, 70; Samuel, 65; Clode, M. L., 10.

4. 2 Grose, 71; Samuel, 65; Clode, M. L., 84. And see Clode, 1 M. F., 442, where, as also in Pipon & Col., 367, extracts are given from this code. Clode, (M. L., 10,) referring to these similar sets of articles, adds—"so that both armies, though opposed to each other, were governed by the same military code." On p. 40, (referring to the articles adopted from the British by our continental Congress,) he observes—"In 1775 the same thing happened in America."

As to the administration of military justice during the period of the Rebellion and the Protectorate, see, further, Pipon & Col., 15–18.

5. In Ward's Animadversions of Warre, Book Second, pp. 41–54. These articles were reprinted in the Journal of the Military Service Institution, p. 135. And see the reference to this code in Stevens' Life of Gustavus Adolphus, 129–130.

6. A large number of English had served, as officers and soldiers, in the armies of Gustavus Adolphus. Scott's Brit. Army, vol. 2, pp. 41–2, 566. As to the influence of his Articles, and of the military law of the Low Countries, in shaping the English code, see Simmons § 1 and notes.

reigns of Charles II and James II, viz. the articles of 1662–3, 1666, 1672, ("Prince Rupert's code,") 1685 and 1688;[1] the last being those in force at the period of the English Revolution and at the date of the first Mutiny Act—1 William and Mary, c. 5, of April 3, 1689. With this Act British Military law began to assume a statutory form.

The first Mutiny Act. The event which induced the adoption of this enactment,—the mutiny and substantial desertion of a detachment of troops, mainly Scotch, which adhered to the cause of the Stuarts and, refusing to obey the order of William III to proceed to Holland, marched northward,—is familiar to the student of military law.[2] The offences thus committed were, by the custom of war, punishable with death, but, by the laws of the realm, not always regarded in this particular by the sovereign, this punishment could not be imposed within the kingdom, by the executive power in time of peace.[3] Parliament therefore availed itself of the occasion of asserting its exclusive authority to license such punishment by enacting on the date above mentioned a statute providing generally that any officer or soldier who should thereafter excite, cause, or join in a mutiny or sedition in the army, or should desert the service, should be punished with death or such other penalty as a court-martial might adjudge.[4] The existing articles of war were not superseded, nor was the prerogative of the Sovereign to make articles, or to authorize the death penalty for offences committed *abroad*, im-

1. A copy of the Articles of 1688, for which I am indebted to Col. G. N. Lieber, Assistant Judge Advocate General, will be found in the Appendix. The originals are printed at the end of the "English Military Discipline" of James II, (published in 1686,) which, consisting mainly of instructions as to military exercises and duties in the field, concludes with a Title—"Of Councels of War, or Courts Martial," which I have also extracted.

2. See 1 McArthur, 22; Adye, 30; Tytler, 102; Samuel, 136; Clode, M. L., 19; Id., 1 M. F., 142, 497; Pratt, 5.

3. "Attempts were made from time to time, especially during the despotic reigns of the Tudors, to enforce military law under the Prerogative of the Crown in time of peace; but no countenance was afforded to such attempts by the law of England; and commissions for the execution of military law in time of peace issued by Chas. I in 1625 and the following years gave rise to the declaration in 1627, contained in the Petition of Right, (3 Chas. I, c. 1.) that such an exercise of the Prerogative was contrary to law." Manual, 7–8.

4. The Act is given in full in the Appendix.

paired by the Act: its effect was, as to this penalty, to preclude its infliction *at home* for any military offences except those which it designated.[1]

Later, in 1718, the making of Articles by the Crown, to be operative within the Kingdom as well as beyond seas, was expressly authorized by parliament in the Mutiny Act; and in 1803 it was enacted that both the Act and the Articles should henceforth apply to the army equally at home and abroad. A general statutory force was thus given to the Articles, which no longer depended for their efficacy upon royal prerogative.[2]

The Mutiny Act, initiated as above indicated, was limited in its operation to a term of about seven months, but, soon after its expiration, was renewed for a year. With frequent additions and modifications it has, since, except for a few brief intervals,[3] been, by annual enactment, continued in force until a very recent period. Meanwhile, though originally consisting of but ten sections, it had become so enlarged as to embrace, in 1878, upwards of one hundred. Meanwhile also the Articles of war, always published with the Act, and from time to time revised, had become, at the date mentioned, nearly two hundred in number. The Articles repeated, though in a different form, many of the provisions of the Act, while in others the two were quite distinct. The necessity of constantly comparing the two, and passing from the one to the other in order to ascertain and harmonize the law, was at least inconvenient, and that the body of law thus dissevered was not sooner consolidated and simplified must remain a matter of surprise to the American student.

The Reform of 1879-1881. Army Act and Rules of Procedure. At length, in 1879, after nearly two centuries of existence, the Mutiny Act, (and with it the code of Articles,) was allowed to expire without renewal, and there was substituted for it, on July 24th of that year, a quite new statute—also however intended to be annually renewed—entitled the "Army Dis-

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1. Clode, M. L., 22; Pratt, 4. And see Barwis *v.* Keppel, 2 Wilson, 314.

2. Pratt, 4; Clode, M. L., 22, 25; Id., 1 M. F., 146, 503; Manual, 14, 15.

3. The only considerable interval, according to the authorities, was one of about two years and ten months, *viz.* from April 10, 1698, to Feb. 20, 1701. Adye, 21; Clode, 1 M. F., 389–391.

cipline and Regulation Act."[1] In a section of this statute th Sovereign was expressly authorized to make not only Articles c war but also "Rules of Procedure" for courts-martial, reviewin officers, &c. Rules, (but no Articles,) were made and publishe accordingly, but, in 1881, both Act, now designated as the "ARM ACT," (or "Army Annual Act,") and Rules, underwent a fu revision. The revised Act, passed August 27th, 1881, has bee since annually continued in force, and, with the Revised Rule (promulgated Aug. 29, 1881,) and a few army regulations,[2] co stitutes the existing code for the royal military forces.

The Army Act is not only a substitute for the old Mutiny Ac but it substantially incorporates also the previous Articles war,[3] and though the King is still empowered to make Article yet the fact of such incorporation, in connection with the cre tion of the Rules of Procedure, will, as observed by a rece writer,[4] "probably render the exercise of this power unnecessa or very rare." There are thus now *no* British Articles of wa nor are there likely to be any for an indefinite period.

The Act and Rules—which will be found in the Appendix- constitute a code considerably more elaborate than that whic they superseded.[5] Whether the form of codification adopte will prove to have been judicious is as yet a question. The

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1. 42 & 43 Victoria, c. 33. This Act superseded also the Marir Mutiny Act. A similar change—it may be noted—had previousl taken place in the *naval* code; the naval Articles of war and gener laws for the government of the navy having been "reconstructed an placed on a new footing by the Legislature in the Naval Discipline A of 1866." Thring, preface and p. 393.

2. See "The Queen's Regulations and Orders for the Army, 1881, Sec. VI.

3. The Act is 'a consolidation of the Army Mutiny Act and Marin Mutiny Act, the Articles of War, and the Army Enlistment Act of 1870 Jones, 18. And see Graham, p. 5.

4. Jones, p. 18.

5. "The effect of the recent legislation has been rather to complicat than to simplify the military code. Some anomalies have been swep away, but with them has also disappeared much of the simplicity whic characterized the administration of military law under the Mutiny A and Articles of War. Not only has the actual punitive code been largel increased in size, but the manner of carrying it out, on the procedure c courts-martial, has become so involved that the regulations concernin it require close attention." Col. Brackenbury, in Preface to Pratt' Military Law.

are certainly, however, embraced in the new law many excellent provisions, some of which will be hereafter referred to. References will also be made to the admirable "Manual of Military Law," published by the War Office, Oct. 1st, 1882, by which such provisions are illustrated.

The Military Code of the United States. The two main points of difference between the composition of the American military code and that of Great Britain are—1, that we have in our law no "Mutiny," or "Army Annual" Act, or other corresponding legislation: 2, that our Articles of war, though in large part derived from the British, are wholly statutory, having been, from the beginning, enacted by Congress as the legislative power. Of these Articles we now proceed to outline the history.

Early History—Code of 1775. The second Continental Congress, having, early in its session, to wit, on June 14th, 1775, "resolved"[1] that a military force should "be immediately raised," to "march and join the army near Boston," proceeded, on the same day, to appoint a committee, consisting of George Washington, Philip Schuyler, Silas Deane, Thomas Cushing, and Joseph Hewes, "to prepare rules and regulations for the government of the Army."[2] On June 28th following, there was reported by the committee, and on June 30th adopted by Congress, a set of Articles, prefaced by a preamble reciting the causes which had induced the Colonies to assume a defensive attitude and raise an armed force—"for the due regulating and well ordering of which," it is declared, "the following rules and orders are established."[3]

Of this code, comprising sixty-nine articles, the original was the existing British code in force in the "ministerial army."[4]

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1. 1 Journals of Congress, 82. The enactments of Congress prior to the adoption of the Constitution were in the form of Resolutions.

2. 1 Jour. Cong., 83. Of this committee, Washington was, on June 15th, chosen general of the army, and Schuyler, on June 19th, a major-general. 1 Jour. Cong., 83, 86.

3. 1 Jour. Cong., 90. These Articles, with the subsequent codes, are given in the Appendix.

4. These British Articles, as copied from the original publication in possession of the Massachusetts Historical Society, are set forth in the Appendix. The fact that the two opposing armies were, at this period, governed by similar codes, has already been noticed.

Many, however, of the articles were, with slight modification copied *directly* from the intermediate MASSACHUSETTS ARTICLI of the preceding April, which may be said to have constitute the first American written code of military law.[1]

The Articles of War thus inaugurated were, by a Resolutio of the same Congress, of November 7, 1775,[2] amended and adde to by sixteen further provisions intended to complete the origin draft in certain particulars in which it was imperfect.[3] In th meantime a provision, which was in fact a separate Article, an is still traceable in our code, relating to precedence in comman between officers of the continental and provincial establishmen and of the militia, had been adopted, on November 4th.

Code of 1776. The Articles of 1775 did not remain long i force. On June 14th of the following year it was *resolved* by Co gress that "the committee on spies be directed to revise the rul and articles of war"[4]; this being a committee of five, consistin of John Adams, Thomas Jefferson, John Rutledge, James Wils and R. R. Livingston, which had been previously appointed " consider what is proper to be done with persons giving intel gence to the enemy or supplying them with provisions."[5] Ne articles prepared by this committee were reported on August 7 following, and the same were agreed to by Congress on Se tember 20th, 1776.[6]

Meanwhile, however, there had been adopted on June 17, 177 a provision "that no officer suttle or sell to the soldiers," und

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1. These articles, (inserted in the Appendix,) were adopted on Ap 5th, 1775, by the provisional Congress of Massachusetts Bay, for t observance of its own troops. (Am. Archives, Fourth Series, vol. I, 1350.) They were followed by similar articles adopted, in May a June of the same year, successively, by the provincial Assemblies Connecticut and Rhode Island, and the Congress of New Hampshi (Id., vol. II, pp. 565, 1153, 1180;) in April, 1776, by the Pennsylva Assembly, (Id., vol. V, p. 705,) and later, apparently, (see 1 Jour. Con 423,) by the Convention of South Carolina—for the government of th respective levies.

2. 1 Jour. Cong., 97, 167.

3. See Appendix.

4. 1 Jour. Cong., 374.

5. 1 Jour. Cong., 365. See Works of John Adams, vol. III, p. 83 to his part in procuring the enactment of these Articles.

6. 1 Jour. Cong., 435, 482. The Articles are set forth in the A pendix.

pain of fine and dismissal by sentence of court-martial.[1] And, further, on August 21st, an article providing for the punishment of spies, whose crime was made capital.[2]

The code of 1776, which was an enlargement, with modifications, of that of 1775, was also a complete re-casting of the same; the articles being assembled, (according to the form of arrangement of the British articles,) under separate Sections, each comprising the provisions relating to some specific or general subject.[3]

Amendments of 1786, &c. The Articles of 1776 continued in force till after the date of the adoption of the Constitution; meanwhile, however, undergoing certain very considerable amendments. The most important of these was the last, that of May, 31, 1786, by which Section XIV of the existing code, with "such other articles as related to the holding of courts-martial and the confirmation of the sentences thereof" was repealed and a new Section, entitled "ADMINISTRATION OF JUSTICE," consisting of twenty-seven articles, was substituted.[4] The occasion of this Amendment, as expressed in the preamble of the Resolution of Congress, was the fact that the pre-existing Articles failed to make adequate provision for the trial of offenders "serving with small detachments," those articles requiring that a general court-martial should consist of thirteen members, and a regimental or garrison court of five members: in the new section the number of the inferior court was fixed at three, and the minimum of the general court at five—limitations which have subsisted to the present time.[5]

Between the dates of the code of 1776 and the important Amendments of 1786 there were enacted various other articles of war or provisions in the nature of such articles, the greater part of which, however, were but temporary in their operation.

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1. 1 Jour. Cong., 377.

2. 1 Jour. Cong., 450. The resolution enacting this article was *ordered* to be "printed at the end of the rules and articles of war"—where indeed a corresponding provision has ever since remained.

3. This arrangement was abandoned in the Code of 1806, and has not since been resumed. The material differences between the articles of 1775 and 1776 will be indicated when we come to treat of the present Articles separately.

4. 4 Journals, 649. See Appendix.

5. The Articles of '86, however, amended the existing code in various particulars other than those indicated in the *preamble*.

Those which are material to be considered in connection wi the study of the specific articles of the present code will hereafter noted.

Later history—Code of 1806. After the adoption of t Constitution, the Articles in force at that date were, by the Fi Congress, in an enactment of September 29th, 1789, express recognized and made to apply to the existing army. They we subsequently, (with some additions,) continued in operation, t the successive statutes by which provision was made for increa ing the army[1], until the inauguration of a new code by the A of April 10, 1806[2].

The Articles of 1806, which superseded all other enactmen on the same subjects[3], were adopted by Congress mainly for th reason that the changed form of government rendered desirabl a complete revision of the code[4]. These Articles—one hundre and one in number, with an additional provision relating to th punishment of spies—remained in force, (except as amended for nearly seventy years, or till the enactment of the revise code of 1874. During this long interval the military statute la underwent but few changes prior to the commencement of th late war. After that date the alterations and additions we much more numerous. But a comparatively small proportio however, of these modifications were permanent.

Code and Revision of 1874. The Code of 1874,—that present in force,—consisting of one hundred and twenty-eigl articles, with a supplementary provision relating to the trial a punishment of spies, is embraced in Sections 1342 and 1343 the Revised Statutes of the United States[5], being Chapter Fi of Title XIV, "THE ARMY."

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1. See Acts of April 30, 1790, s. 3; March 3, 1791, s. 3, 10; Mar 5, 1792, s. 11; May 9, 1794, s. 4; March 3, 1795, s. 14; May 30, 17 s. 20; April 27, 1798, s. 2; May 28, 1798, s. 2; July 16, 1798, s. March 2, 1799, c. 27, s. 8; March 2, 1799, c. 31, s. 3; March 16, 18 s. 10; Feb. 28, 1803, s. 3. In the Acts of 1790, 1795 and 1796, it added—"so far as the same" (the existing articles) "are applical to the Constitution of the United States."

2. This code is given in full in the Appendix.

3. Mills *v.* Martin, 19 Johns. 23.

4. See remarks of Mr. Varnum of the House of Representativ Annals of Cong., 9th Cong., 1st Ses., p. 264; also O'Brien, 335.

5. As to what are the Revised Statutes, see Chapter XVIII—"Le islative Acts and acts of State."

Since the taking effect of the Code of 1874, but few modifications of the Articles have been enacted. Amendments in Arts. 26, 38, and 72, hereafter to be noticed, are the only ones which have as yet been resorted to. Such other changes as, in the opinion of the author, may well be made, are indicated in Chapter XXV. Our military code, however, stands alone among our public statutes in its retaining many provisions and forms of expression dating back from two hundred to five hundred years, and while it is desirable that some of the Articles should be made more precise or extended in scope, and the code itself be simplified by dropping a few Articles and consolidating others, any radical remodeling which would divest this time-honored body of law of its historical associations and interest would be greatly to be deprecated.

In subsequent parts of this work the present Articles of war will be separately reviewed, and their relations to the provisions of other existing statutes, as well as to those of the earlier sets of articles, be remarked upon.

II. OTHER STATUTORY ENACTMENTS RELATING TO THE DISCIPLINE OF THE ARMY.

The second of the components of the WRITTEN MILITARY LAW consists of those of the public statutes which concern the government or discipline of the military service but are not included in the existing code of Articles, although some of them indeed might well be classed as articles of war. The statutes referred to are those relating to such subjects as—the authority of the Superintendent of the Military Academy to convene general courts-martial and execute their sentences; the jurisdiction of courts-martial over militia, cadets, retired officers, convicts at the Military Prison and others; the trial and punishment of officers or soldiers aiding or allowing the escape of convicts; the authority of judge advocates to issue process of attachment of witnesses, and to appoint reporters; the competency of accused persons as witnesses; the disposition of the records of military courts; the restoration of dismissed officers; the dropping of officers for desertion; the trial by court-martial of officers dismissed by order; the composition of courts-martial for the trial of militia; the collection of fines imposed by courts-martial upon militia; the forfeiture of

civil rights incurred by deserters; the military relations of p traders, &c.[1]

These various statutes will hereafter be recurred to, constru or otherwise considered under the appropriate heads.

A further class of enactments, authorizing or restricting t employment of the army for civil or *quasi* civil purposes, will reserved for consideration in Part III of this treatise.

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1. See Rev. Sts., Secs. 1202, 1203, 1228, 1229, 1230, 1256, 1320, 132 1359, 1360, 1361, 1644, 1658, 1659–1660, 1996–1998, 4824, 5306, 531 and Acts of June 23, 1874, c. 244, s. 2; July 24, 1876, c. 226, s. 3; Marc 3, 1877, c. 102, s. 1; March 16, 1878, c. 37; May 11, 1880, c. 85, s. 4.

CHAPTER III.

ARMY REGULATIONS AND ORDERS.

ARMY REGULATIONS.

In passing from Articles of war to Army Regulations, we pass from the province of one department of the government to that of another—from legislative statutes to executive acts. The subject will be treated under the following heads: I. Regulations in general; II. Regulations for the Army; III. Principles governing regulations; IV. Special sets of Regulations.

I. REGULATIONS IN GENERAL.

Their Classification—Express Authority for Regulations. While all law is regulation in a greater or less degree, regulations proper, whether army regulations or other, are administrative rules or directions as contrasted with enactments. The word "regulation" or "regulations," (as also the allied term "rules,") is employed sometimes in the Constitution[1] as descriptive of *statute law*, and this use has proved confusing to the student. A similar designation occurs in certain, especially of the earlier, public Acts, but is not frequent. As a general practice, Congress, in framing a public law and enjoining therein the performance of public business or duty, while expressing such injunction in language more or less general, disposes of the *details* of the performance in one of *three* forms.[2] It either goes on itself to prescribe specific rules for such performance; or it authorizes some public officer to make proper rules for the purpose; or it is entirely silent on the subject, prescribing no regulations itself and devolving no authority, in terms, upon any official. The rules of the *first* class are *statutes:* those of the *second* class *regulations* as distinguished from statutes, and bear-

1. In Art. I, Sec. 4 § 1; Id., Sec. 8 § 11, 14; Art. 4, Sec. 3 § 2.
2. See McCall's case, as cited in note, *post.*

ing a relation to statutes similar to that which the latter bear to constitutional provisions. The *first* form is comparatively rare[1] for the reason that the Legislature can seldom foresee all the details that may require to be regulated in the course of the execution of a statute.[2] Of the *second* form the instances are frequent, and this is the form ordinarily adopted in enactments relating to complex subjects. Thus, by Sec. 161 of the Revised Statutes, the heads of the executive departments are authorized by Congress "to prescribe regulations not inconsistent with law" for the internal government of their departments, the conduct of the business, and the custody and use of the records and public property in their charge. So, in a multitude of minor but important statutes, Congress, in imposing or conferring some special charge or capacity, or in legislating generally upon some matter the particulars of which fall within the executive province, has specifically authorized or directed the proper executive officer—the President, or head of department, or, in some cases inferior official—to make regulations for the proper discharging of the function, or the carrying out of the details of the subject. These regulations indeed, numerous and multifarious as they are, represent the exercise of a very considerable power on the part of our public functionaries, and serve a purpose in the

1. Conspicuous instances are found in the early Acts of March 23, 1792, c. 11, s. 2; March 3, 1803, c. 37, s. 1; April 10, 1806, c. 25, s. 2 and J. R. 14 of July 23, 1846;—also in Act of April 29, 1864, c. 69, s. 1, (Sec. 4233, Rev. Sts.;) in Sec. 337, Rev. Sts., and in the recent Acts of March 3, 1879, c. 195, and Aug. 2, 1882, c. 374, and March 3, 1885, c. 354.

2. Boody *v.* U. S., 1 Wood. & Minot, 164; U. S. *v.* Webster, Daveis, 38.

3. See Rev. Sts., Secs. 219, 463, 465, 466, 1109, 1142, 1174, 1175, 1214, 1241, 1307, 1319, 1522, 1525, 1549, 1620, 1695, 1703, 1752, 1753, 1797, 1801, 1893, 1960, 1969, 2050, 2058, 2071, 2086, 2089, 2110, 2127, 2263, 2381, 2397, 2442, 2450, 2478, 2496, 2505, 2511, 2512, 2513, 2514, 2521, 2544, 2651, 2804, 2858, 2866, 2871, 2897, 2898, 2915, 2944, 2949, 2956, 2971, 2973, 2976, 2982, 2989, 2994, 2999, 3001, 3003, 3005, 3006, 3007, 3019, 3021, 3022, 3026, 3053, 3057, 3064, 3103, 3109, 3120, 3129, 3143, 3144, 3206, 3215, 3220, 3226, 3261, 3291, 3293, 3297, 3310, 3315, 3322, 3329, 3330, 3345, 3351, 3360, 3362, 3369, 3379, 3386, 3396, 3411, 3426, 3427, 3428, 3441, 3442, 3445, 3446, 3447, 3464, 3505, 3527, 3551, 3568, 3574, 3575, 3581, 3645, 3647, 3881, 3911, 3932, 4061, 4067, 4075, 4140, 4462, 4739, 4761, 4787, 4815, 4825, 4862, 5184, 5229, 5232, 5293, 5304, 5306, 5315, 5561, 5567, 5569; also Acts of March 13, 1874, c. 55, s. 6; May 16, 1874, c. 180; June 20, 1874, c. 344, s. 8; June 20, 1874, c. 346, s. 5; March 3, 1875, c. 128, s. 5, 7; March 3, 1875, c. 134, s. 11

efficient administration of our Government not readily or commonly appreciated.

Implied Authority—The Third Class of Regulations. But Congress is incapable of delegating any portion of the legislative power, and the giving, in a statute, of authority to an executive official, to make regulations for executing the same, is, in general, quite unnecessary and of no legal significance, and amounts to no more than an indication, on the part of Congress, of a purpose to leave the details of execution where in fact they properly belong, with a suggestion, sometimes, as to the particulars especially to be regulated. Thus, in the cases of a great majority of the statutes of the second class, an authority in the Executive to make regulations would legally have been *implied* without any express grant to that effect. So, there are many statutes of the *third* class—those in which Congress is silent as to the matter of the execution of the details—in which such an authority results by a legal implication from the terms or subject of the enactment, considered in connection with the inherent function of the Executive. The Constitution devolves it upon the executive department to "take care that the laws be faithfully executed." In a case, therefore, of a law of which the

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March 3, 1875, c. 136, s. 3; March 3, 1875, c. 156, s. 6; May 23, 1876, c. 104; Aug. 15, 1876, c. 289, s. 5; Aug. 15, 1876, c. 300, s. 1; J. R. 6, of March 3, 1877; Acts of April 10, 1878, c. 58; June 6, 1878, c. 156; June 2, 1879, c. 11, s. 3, 5, 6; June 16, 1880, c. 253, s. 4; June 19, 1882, c. 231; Aug. 3, 1882, c. 376; Aug 5, 1882, c. 392, s. 4; Aug. 5, 1882, c. 398; Jan. 16, 1883, c. 27, s. 1; March 3, 1885, c. 319 s. 6; and many other provisions of minor importance or more limited application. Repeated instances also occur in the statutes where, though the word "regulations" is not employed, the same meaning is conveyed by some equivalent term or expression;—as by the term "directions," "instructions," "forms," "requirements," "restrictions," "conditions," "limitations," "by-laws." Not unfrequently a thing is required by the statute to be done in such manner, &c., as a head of a Department, &c., "may prescribe." The "Revised Regulations for the Government of the Revenue Marine of the United States," a pamphlet of some 70 pages of rules and forms, issued by the Secretary of the Treasury in Aug., 1871, and resting on no authority more express than is found in the terms of Secs. 2758 and 2762 placing this corps (of about one thousand members) under the general direction of the Secretary, is a striking illustration of the discretion exercised by heads of Departments in making regulations as to matters of detail.

The point may be noted here that regulations duly framed under a statute may sometimes well be referred to as a practical interpretation of the statute itself. See U. S. *v.* Cottingham, 1 Rob. (Va.) 635.

execution requires to be specifically methodized, it is the duty that department, and it is authorized, in the absence of a *express* authority for the purpose, to prescribe the rules or dire tions necessary and proper to effectuate the object of the statute care of course being taken that the regulations shall not parta of the nature of legislation. This inherent authority of t Executive—the President, or head of a Department acting f and representing him—has been repeatedly noticed and affirm by the authorities.[2]

II. REGULATIONS FOR THE ARMY.

Their Original Source and Authority. The authori for army regulations proper is to be sought—primarily—in tl distinctive functions of the President as Commander-in-chief a as Executive.[3] His function as Commander-in-chief authoriz him to issue, personally or through his military subordinate such orders and directions as are necessary and proper to ensu order and discipline in the army. His function as Executi empowers him, personally or through the Secretary of War,[5]

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1. A very recent instance of Army regulations instituted for the pu pose of executing the intent of a statute in which no authority for reg lations is conveyed in terms, is that of the regulations published in G. 55 of 1885, for effectuating the provisions of the Act of Feb. 14, 188 entitling enlisted men to be placed upon the retired list.

2. "Of course Congress cannot constitutionally delegate to the Pre dent legislative powers; but it may, in conferring powers constitutional exercisable by him, prescribe, or omit prescribing, special rules of th administration, or may specially authorize him to make the rules. Wh Congress neither prescribes them, nor expressly authorizes him to ma them, he has the authority, inherent in the powers conferred, of ma ing regulations necessarily incidental to their exercise, and of choosi between legitimate alternative modes of their exercise." McCall's Case. Philad. 269. And see Wayman *v.* Southard, 10 Wheaton, 42, 43; U. *v.* Macdaniel, 7 Peters, 2; U. S. *v.* Bailey, 9 Id. 238; Lockington *v.* Smit 1 Peters, C. C. 471; Boody *v.* U. S., 1 W. & M. 164; *In re* Spangle 11 Mich. 298; *In re* Griner, 16 Wis. 423; Antrim's Case, 5 Philad. 28 Allen *v.* Colby, 47 N. H. 544; Cooley, Prins. Const. Law, 44; I Opin At. Gen., 478; II Id., 225, 243-5, 421; IV Id., 225, 227; VI Id., 36

3. Compare DIGEST, p. 116, note 1.

4. That military commanders, in giving legal orders, represent t Commander-in-chief, the President, see Clark *v.* Dick, 1 Dillon, Lockington's Case, Brightly, 289; O'Brien, 30.

5. That army regulations duly issued by the Secretary of War are law the acts and regulations of the President as Executive or Commande

prescribe rules, where requisite, for the due execution of the statutes relating to the military establishment, similarly as above noticed in treating of regulations in general. The former description of regulations scarcely differ from some of the Orders which remain to be separately noticed except in that they are of a more permanent character. Those of the latter species are more strictly "regulations," being especially within the description of rules "in aid or complement of statutes."[1]

From these two sources is derived an original and sufficient authority for army regulations in general, no authority or sanction on the part of Congress being required. Congress, however, has repeatedly conferred such authority in express terms where *general* regulations were to be issued, and has sometimes also reserved to itself a right of approval or supervision of the same when made. For *special* regulations also it has frequently given an express authority.

Regulations as authorized or affected by Legislation —The successive Publications of Regulations. The action of Congress on the subject of general army regulations, subsequently to the adoption of the Constitution,[2] may be said to have commenced with the Act of March 3, 1813, c. 52,

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in-chief, see U. S. *v.* Eliason, 16 Peters, 301; Do. *v.* Webster, Daveis, 59; Do. *v.* Freeman, 1 Wood. & Minot, 50–1; Lockington's Case, Brightly, 288; McCall's Case, 5 Philad. 269; *In re* Spangler, 11 Mich. 322; Cooley's note to 2 Story, Const. Law, 314; Flanders, Expos. of Const., 169; V Opins. At. Gen., 39; DIGEST, 445–6, and note.

1. VIII Opins. At. Gen., 343.

2. Prior to the adoption of the Constitution, Congress, (which then constituted the government,) provided from time to time for regulations for the army, principally for the government of the staff corps. In some cases the Board of War, then consisting of civilians, was directed to make regulations. (2 Journals of Congress, 432, 520; 3 Id., 328.) In others, chiefs of the different corps were so authorized; as the Quartermaster General, for certain classes of his employes, (Id., 126; 3 Id., 253, 496;) the Inspector General, (3 Id., 203, 523, 525;) the Director of Military Hospitals, (Id., 527;) and the Medical Board, (Id., 705.) The Secretary of War, after one was appointed by Congress, was, in addition to his general duties, required to "regulate," or "direct," as to certain special subjects—as the making of payments and returns and keeping of accounts by regimental paymasters, (4 Journals, 7,) the making and transmitting of returns by officers generally, (Id., 9;) and the duties of the commissary general of prisoners. (Id.) On March 29, 1779, Major General (Baron) Steuben's "System of Regulations for the Infantry of the United States," a work consisting mainly of tactics and

s. 5,[1] in which the Secretary of War was authorized and require "*to prepare general regulations better defining and prescribing th respective duties and powers of the several officers in the adjutan general, inspector general, quartermaster general, and commissar of ordnance departments, of the topographical engineers, of the aid of generals, and generally of the general and regimental staff which regulations,*"—it was added—"*when approved by the Pres ident of the United States, shall be respected and obeyed unti altered or revoked by the same authority. And the said genera regulations, thus prepared and approved, shall be laid before Con gress at their next session.*"

Under this statute there was published a brief manual of reg ulations of some sixty duodecimo pages—the original of th compend now in use—bearing the endorsement: "Approved b the President, War Office, 1st May, 1813." These regulation were laid before Congress on June 7th, 1813, but no legislativ action was taken upon them.[2]

The next statute[3] of general importance was that of April 24 1816, c. 69, ("for organizing the general staff," &c.,) by which in section 9, it was enacted "*that the regulations in force befor the reduction of the army,*" (referring to the Act of March 3, 1815 "fixing the military peace establishment," after the war wit Great Britain,) *be recognized, as far as the same shall be foun applicable to the service, subject however to such alterations as th Secretary of War may adopt with the approbation of the Presi dent.*"[4]

In view of the authority thus given for additions and amend ments, there was published a second and more extended set o

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instructions for field service, was adopted and ordered to be observed i the army. (3 Id., 237.) As to the publications of these and other earl regulations and orders, see further in Gen. J. B. Fry's Pamphlet on "Th different editions of Army Regulations," New York, April 10, 1876.

1. For *prior* legislation of inferior and temporary importance th student is referred to the Acts of May 9, 1794, c. 24, s. 5; March 2 1799, c. 27, s. 5; Jan. 2, 1812, c. 11, s. 1; July 6, 1812, c. 128; Marc 3, 1813, c. 48, s. 5. The provision of March 19, 1802, relating to Regu lations for the Military Academy, will be hereafter separately noticed.

2. Annals of Congress for 1813, pp. 23, 144.

3. The intermediate Act of Feb. 8, 1815, c. 38, s. 4, 10, provide specially for regulations for the ordnance department.

4. In s. 7 of this Act it was further provided "*that the manner o issuing and accounting for clothing shall be established in the genera regulations of the War Department.*"

regulations, (embracing amplified regulations for the ordnance corps,) dated "September, 1816." These were republished with additions in 1817 and 1820; and, on March 2, 1821, in section 14 of chapter 13 of the Acts of that year, a revision, by Gen. Scott, of the existing regulations, received the formal sanction of Congress by enactment as follows:—"*that the system of 'general regulations for the army', compiled by Major General Scott, shall be, and the same is, hereby approved and adopted for the government of the army of the United States, and of the militia when in the service of the United States.*" In the next year, however, (1822,) by Act of May 7th, c. 88, the section of 1821 was expressly "repealed"; the grounds for this action mainly being that the regulations as adopted operated with injustice in the provision authorizing the transfer of officers, and also in that relating to brevet rank.[1] Neither of these provisions has, to the present time, been repeated in the regulations for the army.

The regulations approved in 1821 were first published to the army in "July, 1821," when they were prefaced by an order of the Secretary of War, which recited that they had been approved by Congress, with the exception of fourteen, (indicated by their numbers,) which had "received the sanction of the President." These regulations, notwithstanding the legislation of 1822, continued to be observed[2] till March 1, 1825, when an enlarged edition was published to the army. This, with some modifications, remained in force till Sept. 1, 1835, at which date a revision by Major General Macomb was printed by authority of the War Department, which was re-issued with amendments on Dec. 31, 1836. Further, on January 25, 1841, May 1, 1847, January 1, 1857, and August 10, 1861, successive revisions, containing additions and variations, were promulgated; each publication exhibiting an introductory announcement to the effect that the

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1. Annals of Congress for 1822, pp. 1730–1734, 1753–1758, 1868. And see Gen. Fry's Pamphlet, (above cited,) p. 4.

2. They were so observed because of the previous sanction of the President, (under the Act of 1816,) which sanction was held by Atty. Gen. Wirt to have given them an efficacy not affected by the legislation of 1822. I Opins. 547. And see G. O., War Dept., May 22, 1822, in which, in stating the fact of the repeal of the provision of 1821 by that of 1822, it is announced that—"the General Regulations for the Army" thus "rest solely on the sanction of the President. The said Regulations are therefore continued in force by his authority in all cases where they do not conflict with positive legislation."

regulations thus revised had been approved by the President and were by his command published for the information and government of the military service", to be from their date "strictly observed as the sole and standing authority upon the matter therein contained." And it is added, in the more recent issues,—"nothing contrary to the tenor of these regulations will be enjoined in any part of the forces of the United States by any commander whatever". The revision of 1861 was republished as of June 25, 1863, and this last edition remained in use during the latter portion of the late war and subsequently till the year 1881.

Until the year 1866, the enactments of 1813 and 1816 continued to constitute the main legislative authority and sanction for the making and amending[1] of general army regulations; these enactments indeed being from time to time supplemented by special statutory provisions relating to particular branches of the service.[2]

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1. The power to *amend* the existing regulations, as conveyed by the Act of 1816, was repeatedly recognized by the authorities during this interval. Thus Atty. Gen. Wirt, in an opinion addressed to the Secretary of War in 1821, observes:—"I have no doubt that the Secretary may, with the approbation of the President, alter at pleasure the existing regulations, * * * even although such alteration should go to an entire change of the present system; provided that such regulations, as proposed to be altered, be consistent with the Constitution and laws of the United States." I Opins., 470. And see, to a similar effect, I Id., 549; III Id., 85. Later, Atty. Gen. Cushing, referring to the enactment of 1816 as a "permanent provision" for army regulations, remarks that—"under this authority it is that the subsisting" (1853) "regulations for the army have legal effect." VI Opins. 15. That the Act of 1816 authorized the Executive to alter at discretion the regulations recognized by it as in force, is also held by a United States Court in U. S. *v.* Maurice, 2 Brock. 105. And compare, as to the authority to alter the regulations for the Navy, given by the Act of July 14, 1862, (Sec. 1547, R. S.), the opinion of Atty. Gen. Bates in X Opins. 416.

It may be noted that the army regulations during this interval received indirect sanction from repeated statutes referring to them in general terms as the "existing regulations," and also from a series of appropriation Acts in which appropriation was made for the "printing" of the same.

2. Of these provisions a considerable proportion still remain, in whole or in part, in force; the principal being the Acts of April 14, 1818, c. [illegible], (Rev. Sts., Sec. 1141;) May 15, 1820, c. 102, s. 3, (R. S., Sec. 1191;) March 3, 1825, c. 93, s. 2, (R. S., Sec. 1241;) April 5, 1832, c. [illegible], (R. S., Secs. 1109, 1110;) Aug. 23, 1842, c. 186, s. 3, (R. S., Sec. 1143;) May 15, 1846, c. 21, s. 5, (R. S., Sec. 1152;) Aug. 4, 1854, c. 247, s. 5, (R. S., Sec. 1214;) Aug. 16, 1856, c. 125, (R. S., Sec. 1179;) Aug. 3, 1861, c. 42, s. 14, (R. S., Sec. 1175;) July 17

Later legislation. In 1866, by the Act of July 28, c. 299, 'fixing the military peace establishment' at the end of the war, the Secretary of War was "*directed to have prepared, and to report to Congress, at its next session, a code of regulations for the government of the army and of the militia in actual service, which shall embrace all necessary orders and forms of a general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts-martial. The existing regulations to remain in force until Congress shall have acted on said report.*" Here the general regulations in use in the army were, as a whole, for the first time since 1821, formally approved and recognized by Congress, and, for the first time since 1816, (when however *new* regulations were authorized only as "alterations" of those existing,) provision was made for a new issue. No regulations, however, were reported to Congress

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1862, c. 201, s. 1, (R. S., Secs. 1643, 1648;) March 3, 1863, c. 78, s. 8, (R. S., Sec. 1174;) March 3, 1865, c. 81, s. 5, (R. S., Sec. 1145.)

Within this period also fall sundry statutes, authorizing or directing the making of special military regulations of but secondary importance and temporary operation,—such as the following: Act of June 15, 1832, c. 131, s. 1, (discipline of mounted rangers;) J. R. of July 29, 1848, (pay of troops in Mexican war;) Acts of Jan. 31, 1862, c. 15, s. 1, (use of telegraph and railroad lines;) April 16, 1862, c. 55, s. 2, 3, (duties of certain medical officers;) J. R. of July 12, 1862, (issue of clothing to sick, &c., soldiers;) Acts of July 17, 1862, c. 201, s. 12, (employment of colored troops, &c.;) Dec. 27, 1862, c. 5, s. 2, (duties of medical inspectors;) Feb. 7, 1863, c. 23, s. 6, 7, (employment of Kentucky vols.;) March 3, 1863, c. 75, s. 6, 16, (Prov. Mar. Genl's Dept.;) Feb. 24, 1864, c. 13, s. 5, 7, (furnishing substitutes for drafted persons, and enlistment of soldiers into the navy;) March 11, 1864, c. 27, s. 4, 5, (as to the ambulance corps;) June 15, 1864, c. 124, s. 4, and March 3, 1865, c. 79, s. 5, (pay, &c., of colored troops;) June 25, 1864, c. 149, s. 2. (examination of staff officers;) July 4, 1864, c. 253, s. 1, (business in Q. M. Dept.;) March 3, 1865, c. 79, s. 14, (credits for drafted troops;) March 3, 1865, c. 90, s. 1, 2, (bureau of refugees, freedmen, &c.;) July 16, 1866, c. 200, s. 14, (military protection of certain civilians;) July 28, 1866, c. 296, s. 15, (payment of additional bounty.)

Of the special regulations of this period the most extended and important were those which proceeded from the Provost Marshal General's Bureau, with the approval of the Secretary of War, under the Act of 1863 above cited. A set of these, first issued on April 21, 1863, was revised and republished with additions on May 1, 1864, and again on Sept. 1, 1864.

The Act of March 3, 1851, c. 25, s. 2, 9, providing for regulations for the Military Asylum, (now Soldiers' Home,) not noted above, will be referred to hereafter.

under this Act, or till after the passage of the Act next to b mentioned.

Later, in 1870,[1] by s. 20, c. 294, Act of July 15, the legislati of 1866 was, so far as regards the provision for new regulation substantially superseded by an enactment—"*that the Secreta of War shall prepare a system of general regulations for the a ministration of the affairs of the army, which, when approved Congress, shall be in force and obeyed until altered or revoked the same authority; and said regulations shall be reported to Co gress at its next session.*" In compliance with this statute, complete set of army regulations were reported to Congress b the Secretary of War, on Feb. 17, 1873.[2]

No determinate action, however, was taken upon these regul tions by Congress; but, in 1875, by act of March 1, c. 115, (st in force,) the requirement of the section of 1870, that the reg lations be reported to and approved by Congress, was "repealed, and the President was specifically "*authorized under said secti to make and publish regulations for the government of the arm in accordance with existing laws.*" Here Congress relinquish the right, which it had repeatedly reserved in previous statute of ratifying, or at least supervising, the regulations, and surre dered to the Executive the fullest control over the subject. F not only is the President hereby empowered to make regulatio without restriction as to form, quantity, or quality, but also witl out limitation as to time. He thus has the power to re-mak and alter, in the future[3]—a power expressly given by the Act 1816 and exercised thereunder till 1866, divested apparently b the legislation of the latter year,[4] reserved to Congress by th Act of 1870, but now fully restored.

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1. Meanwhile special regulations relating to military subjects we authorized by several statutes of which the following are still in force:- Act of July 28, 1866, c. 299, s. 17, (Rev. Sts., Sec. 1180, as to hospit stewards;) J. R. of May 4, 1870, (Id., Sec. 1225, as to issue of arms, &c for colleges;) Act of June 17, 1870, c. 132, s. 1, (Id., Sec. 4787, as artificial limbs, &c., for disabled soldiers.)

2. These regulations are printed in Report, No. 85, Ho. of Reps 42d Cong., 3d Sess.

3. In U. S. v. Eliason, 16 Peters, 301-2, the Supreme Court, referrin to the general power of the Executive to establish regulations for tl government of the army, say—"The power to establish implies, nece sarily, the power to modify or repeal, or to create anew." And see I Opins., 63; V Id., 41.

4. See XIV Opins. 173. The view, however, expressed by the Att

In the next year, (1876,) however, by a Joint Resolution of Aug. 15, Congress "requested" the President "*to postpone all action in connection with the publication of said regulations until after the report*" of the Commission on the reform and reorganization of the army, created by Act of July 24, 1876, was "*received and acted upon by Congress at its next session.*"

Upon the "report" here indicated no final action was ever taken, and the said Commission was, after March 4, 1879, discontinued. Thereupon, by Act of June 23d of that year,[1] the Secretary of War was "*authorized and directed to cause all the regulations of the army and general orders now in force to be codified and published to the army, and to defray the expenses thereof out of the contingent fund of the army.*"

The present Army Regulations. Upon this legislation, which was in effect an appropriation for the expense of carrying out the enactment of 1875, a compilation of regulations and general orders, in force on Feb. 17, 1881, was made and published to the army by the Secretary of War as of that date. This compend comprises the present Army Regulations. The volume embraces the various usages and general rules previously in force relating to the command and internal administration and routine of the military establishment, promotion of officers, discipline of posts and of troops in the field, instruction of officers and soldiers, business of staff departments, care of arms, stores, and public animals, reports and returns with forms for the same, recruiting service, procedure of courts-martial, duties of civil employees, &c. The publication includes also special regulations prescribed or authorized by express statute as to particular subjects—as the issue of arms to colleges and the duties of officers detailed thereat as professors, (see Rev. Sts., Sec. 1225;) the duties of ordnance sergeants and hospital stewards, (Id., Secs. 1109, 1180;) the uniform of the army and issue of clothing to troops, (Id., Sec. 1296;) deposit of soldiers' savings, (Id., Sec. 1307;) national cemeteries,

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Gen., in this opinion, as to amendments, was not followed by the Secretary of War; repeated amendments being made and published in Orders between 1866 and 1875.

1. Meanwhile—since 1870—had intervened the Act of Aug. 15, 1876, c. 300, authorizing regulations as to the furnishing of artificial limbs in certain cases, and the Acts of March 3, 1873, c. 249, s. 2, and April 10, 1878, c. 58, to be hereafter referred to, providing for regulations for the Military Prison and for the preparation, &c., of bids for contracts.

(Id. Sec. 4880; making of bids for contracts. Act of April 10 1878.[1]

Since the publication of these "Regulations," the authorit to *modify* the same has been most freely exercised; a multitud of amendments, additions and revocations having been announce in General Orders.[2]

No legislation of Congress on the subject of general regulatior has since been had.[3]

Legal Effect and Force of Army Regulations. W have seen that Congress, in the existing law, no longer reserve to itself the function of approving the army regulations, or make its approval of the same a condition to their taking effect, bu that under the Act of 1875 above cited, the President is veste with a general and exclusive authority to make and publish regu lations for the army. As has heretofore been remarked, he may in the due execution of the laws for the government of the army make needful and proper regulations without any legislativ authority whatever, similarly as he may give orders as com mander-in-chief. A statutory authority for general army regu lations is indeed mainly useful and significant as a justificatio of such expenses as it may be necessary from time to time t incur in the publication of the regulations, since it implies tha the requisite appropriation for the same will be made by Con gress.

But, whether or not resting upon any express authority statute, the *legal effect* of army regulations—as of other regul tions proper—is, as already indicated, simply that of executiv

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1. The regulations specifically authorized by this Act were made th occasion for the preparation and adoption of much more extended re ulations covering the general subject of contracts and purchases f the Army. See pars. 1478–1570, Art. LXXV, Army Regulations.

2. Since the issue of these Regulations, and up to October 1, 188 amendments of the same were published in about *Two Hundred a Fifty* separate General Orders. Many of these Orders contain amen ments of more than one, often of several, regulations. Certain regul tions are amended not once but several times in successive Orders.

3. Special regulations have indeed been authorized for particular pu poses, As, by the Act of June 30, 1882, c. 254, s. 1, for the conduct the Army and Navy Hospital to be erected at Hot Springs, Arkansa and by the same Act, s. 3, in regard to the crediting of recruits f necessary articles furnished them before joining their companies.

administrative, instrumental rules and directions as distinguished from statutory enactment.[1] It is indeed loosely said of the army regulations by some of the authorities[2] that they have "the force of law," but this expression is well explained by the court in U. S. *v.* Webster,[3] as follows:—"When it is said that they have the force of law, nothing more is meant than that they have that virtue when they are consistent with the laws established by the Legislature." That is to say, while they have a legal force, it is a force quite distinct from, and inferior and subordinate to, that of the statute law. They are thus not law in the sense of being a part of the "law of the land," nor are they embraced in the designation, "laws of the United States," but are law, and operative, *as regulations* only. As such they are law to the army and those whom they may concern, and so far are binding and conclusive.[4] The President, equally with the most subordinate officer, is bound by executive regulations: although he may be empowered to alter or abrogate them, they are conclusive upon him while they remain in force.[5] They are also recognized as conclusive upon the courts in cases to which they apply;[6] and when made in and for one department of the government, they are conclusive upon any other department in which, in the settlement of accounts or claims, or otherwise, they are found to be pertinent to the subject.[7]

The binding force and application to the army of the army

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1. IV Opins. At. Gen., 62; VIII Id., 343.

2. Gratiot *v.* U. S., 4 Howard, 117; XIV Opins. At. Gen., 173.

3. Daveis, (2 Ware,) 54.

4. See II Opins. At. Gen., 520, 580; O'Brien, 31; U. S. *v.* Freeman, 3 Howard, 567; U. S. *v.* Morrison, 96 U. S., 233; also Arthur *v.* U. S., 16 Ct. Cl., 422, where it was held that a contract made by the Surgeon General with an acting assistant surgeon for a compensation in excess of that fixed by the army regulations did not bind the United States. And compare Camp *v.* U. S., 113 U. S. 648.

5. X Opins. At. Gen., 17.

6. Lockington's Case, Brightly, 269; Hughes *v.* Oaks, 59 Pa. St. 52. In the latter case, (p. 42,) the court, in reference to the authority devolved upon the Secretary of the Treasury by the Acts of July 13, 1861, and May 20, 1862, to prescribe regulations in regard to commercial intercourse pending the late war, observe:—"A sound discretion is vested in him, and it being of a governmental character, it is not liable to our revision or reversal." But see *post* as to the action of the courts where regulations are not *equitable*.

7. V Opins. At. Gen., 39–40; U. S. *v.* Freeman, 3 Howard, 567.

regulations is illustrated by the fact that a failure to observe regulation may constitute a military offence cognizable by cou martial under the 62d Art. of war.[1] On the other hand, offic and soldiers, in complying with an authorized regulation will justified in law and protected by the courts.[2]

III. PRINCIPLES GOVERNING REGULATIONS.

But, to have legal force and effect, the regulations must c form to certain principles, as follows:[3]

1. They must not contravene existing law. Regulatic proper being subordinate to statutory and constitutional law is clear that an executive regulation may not conflict with contravene either the Constitution or the provisions of an of Congress, and that, where it does so, it is, so far, of no effe So, if Congress by express legislation should cover the grou previously occupied by such a regulation, the latter would be c placed and become inoperative, the higher law being paramou

It is in recognition of this principle that, in statutes autho ing or directing the making of regulations, it is not unfrequen prescribed in express terms that the same shall not be inc sistent with, or contrary or repugnant to, the laws, or the Con tution and laws, of the United States, or in words of like impo

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1. DIGEST, 45, 118.

2. Gates *v.* Thatcher, 11 Minn., 204. Note the Act of Dec. 17, 18 c. 1, in regard to the laying of an embargo, in which, (s. 11,) it is p vided that a collector sued for exercising certain powers under the s ute, "may give this Act and the *instructions and regulations of President* in evidence for his justification and defence."

3. Should army regulations in the future materially fail to conform the principles stated, they may invite from Congress action simila that taken in 1822. See *ante*.

4. U. S. *v.* Webster, Daveis, (2 Ware,) 54; Boody *v.* U. S., 1 Wooc Minot, 164; McCall's Case, 5 Philad. 259; *In re* Spangler, 11 Mich., Magruder *v.* U. S., Devereux, 148; Harvey *v.* U. S., 3 Ct. Cl., 41 Opins. At. Gen. 470; II Id., 57–8, 232; V Id., 62; VI Id., 10, 215, XI Id., 254; XIII Id., 516; O'Brien, 31. In a recent Order, G. O. Hdqrs. Army, 1882, a certain regulation is "annulled" as being conflict with" a provision of the Rev. Sts.

5. II Opins. At. Gen., 232. And see McCall's Case, 269, 273.

6. See, for example, Rev. Sts., Secs. 1752, 2058, 2651, 2949, 2 3001, 3003, 3057, 3215, 4825, Acts of June 20, 1874, c. 344, s. 8; Ma 3, 1875, c. 130, s. 3; June 16, 1880, c. 253, 4; June 19, 1882, c. 231, s The Act of March 1, 1875, authorizing the issue of the present a

But such a provision is of course surplusage, a condition to this effect being always implied.

2. ***They must not legislate.*** Regulations must confine themselves within their appropriate province—must not trench upon that of legislation. A regulation which assumes to prescribe in regard to a matter which is properly a subject for original legislation departs from "the range of purely executive or administrative action,"[1] is in a just sense a regulation no longer, and can have no legal effect as such. The leading case illustrative of this principle is that of the regulations for the navy, entitled a "System of Orders and Instructions," issued by the President in 1853, and which were condemned by Attorney General Cushing as being mainly of a "legislative quality," and in derogation of the constitutional powers of Congress, and therefore unauthorized and inoperative.[2] Similar views have been expressed by the authorities in other cases of a similar nature;[3] and it can scarcely be questioned that army regulations which assume to control enlistments, to vest or divest rights to pay or rank, to dispose of public property, to administer justice, to prescribe rules of evidence, or to regulate any other subject usually and properly regulated by the legislative power,—are *ultra vires* and unauthorized.[4]

Whether indeed a regulation does or does not partake of the character of legislation may sometimes be an embarrassing question. It has been remarked by Attorney General Cushing that "cases may be supposed in which it is not easy to draw the line between what is legislative and what is executive and minis-

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regulations, requires that they shall be "in accordance with existing laws." In Rev. Sts., Sec. 2086, it is specified that certain regulations authorized shall be "not inconsistent with treaty stipulations," (with Indians.)

1. VI Opins. At. Gen., 15. In Magruder *v.* U. S., Devereux, 148, the Court of Claims, referring to regulations, observe—"It is the duty of the Departments to administer the law, and not to make it."

2. VI Opins. At. Gen. 10–19.

3. X Opins. At. Gen. 11–18, 413–4; IV Id., 226; *In re* Griner, 16 Wis. 433–4; McCall's Case, 5 Philad. 269.

4. Compare Clode, 1 M. F., 150, (and see Grant *v.* Gould, 2 H. Bl. 100,) as to the point that the Crown is not authorized to make articles of war relating to any subject other than the government of the army. And see Chapter XXV, (Third Article,) "Enlistment in general."

import, in respect to the degree of the authority, is in general to be ascribed to the words "authorized" and "required," or their synonyms. Nor is the scope of the authority necessarily to be deemed to be essentially affected by the character or dignity of the official in whom it is vested. But where the regulations are to pertain to an extended and unusually important subject, as where they are to carry into effect an entire statute of many or varied provisions; where they are to adjust the details of a ramified and comprehensive system; where high public considerations enter into the execution of the Act under which they are to be established;—in cases such as these the authority must needs be larger and more liberally construable than where the subject of a single provision, or a subject of a limited range or consequence, is to be regulated.[1] The widest discretion in the framing of regulations may, it is conceived, properly be taken by the Executive in a case where the enactment conveying the authority has been prompted by the necessities of a grave public emergency, and especially an existing or impending state of war.[2]

4. ***They must be uniform.*** The further minor principle has also been noticed by the authorities that regulations must be "*uniform*," that is to say in their application;—that they must apply equally and alike to all the persons or subjects of the class to which they relate. In this view, Attorney General Legaré, in advising the Secretary of the Treasury as to certain regulations to be issued by him under the revenue laws, observes—"I need scarcely add that your regulations must be uniform throughout the Union."[3] So the Supreme Court, in an adjudged case,[4] remark, of army regulations, that they "must be uniform and applicable to all officers under the same circumstances." In a few instances the public statutes, in providing for regulations, have specifically required that they be "uniform."[5]

5. ***They should be equitable.*** It need scarcely be added

1. See The Thomas Gibbons, 8 Cranch, 428–9; Lockington *v.* Smith, 1 Peters, C. C., 470–473.

2. Hughes *v.* Oaks, 59 Pa. St. 41, 42.

3. IV Opins., 63.

4. U. S. *v.* Ripley, 7 Peters, 25. And see U. S. *v.* Webster, Daveis, (2 Ware,) 60.

5. As in the Acts of Aug. 10, 1846, c. 175, s. 2; March 3, 1863, c. 71, s. 27.

that regulations should be just and equitable—that they should not be arbitrary or oppressive.[1] As already noticed, a regulation cannot deprive a person of a legal right,[2] and where a regulation is found to work an injustice in any material matter, as in the settlement of an officer's accounts, it will be disregarded by the courts.[3]

Objectionable Features of Army Regulations. To the student, as well as in practice, army regulations are the most unsatisfactory element of our written military law. Presented in connection with statutes from which they are sometimes imperfectly discriminated; not unfrequently themselves partaking of the character of legislation and thus of doubtful validity and fatally subject, as we have seen, to constant and repeated modification, their effect too often is to embarrass and mislead where they should assure and facilitate. To render them entirely useful, they should, in the opinion of the author, be reduced to the smallest available bulk; all that are really statutes and all that are of a legislative quality should be eliminated; only those should be included that are purely *general*, those relating to the business of the staff corps being left to be established by the heads of the same, subject to the approval of the President; and the authority to amend should be most rarely exercised.

IV. SPECIAL SETS OF REGULATIONS.

Besides the special regulations for certain of the staff departments of the Army—as the Ordnance, Medical, Subsistence, &c., departments—which are contained only in part in the General Army Regulations, there are special sets of regulations, in no part embraced therein, which may properly be noticed in this Chapter—as follows:

1. The Regulations for the Military Academy. While the cadets, professors, &c., of the West Point Military Academy

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1. "It would be directly repugnant to the character of the power conferred, to suppose that a power to make *rules* was a power to dispense with them altogether, and to substitute in their place caprice or arbitrary discretion." Atty. Gen. Toucey, V Opins. 42.

2. See IV Opins. At. Gen., 223.

3. U. S. *v.* Cadwalader, Gilpin, 563. And see U. S. *v.* Mann, Brock., 9, 11.

are, as a part of the Army, subject to the Army Regulations,[1] they are also subject to special regulations framed expressly for their government as a separate branch of the military establishment. These regulations, initiated in the authority given by or implied from the Acts of March 16, 1802, c. 9, s. 26–28 and April 29, 1812, c. 72, s. 3, organizing and making provision for the corps of engineers,[2] now consist of a set, of 362 paragraphs, published in 1877, and republished June 1, 1883; this revision having been preceded by various issues of which the principal were published in 1831, 1853, 1857, 1866 and 1873. Less extended regulations had previously existed in writing and are found in records of the Engineer bureau dated as early as in 1817 and 1818.

The authority and binding force of the special regulations for the Academy, and the power of the President to modify and add to the same, have been recognized in the opinions of the Attorneys General.[3]

It need hardly be observed that the principles, heretofore indicated as properly governing the framing of general regulations for the army and their substance, are equally applicable to these special regulations.[4]

2. **Regulations for the Military Prisons.** The Act of March 3, 1873, c. 249, which provided for the establishment of the Military Prison now maintained at Fort Leavenworth, Kansas, required the Secretary of War to organize a Board of direction which, it was added, should "frame regulations for the government of the prisoners in accordance with the provisions of the Act.[5]

A set of regulations for this purpose was published from the Headquarters of the Army in G. O. 12 of Feb. 19, 1877, and a subsequent amended set—that now in force—in G. O. 100 of

1. VII Opins. At. Gen., 328.

2. The published volume includes also regulations specially authorized or directed, by Secs. 1319 and 1330, Rev. Sts., to be prescribed for the examination of appointees to cadetships, and in regard to the granting of leaves of absence to officers of the Academy.

3. I Opins. At. Gen., 469; VII Id., 328.

4. The only portion of these regulations which would appear to be subject to criticism is that relating to "Discipline." Some of the paragraphs under this head are in the form of *articles of war*, and might thus be deemed to trench upon the province of *legislation*.

5. Rev. Sts., Sec. 1345.

1883. These relate to the duties of the officers and employee at the institution and the books and accounts to be kept by them and further to the admission, classification, diet, clothing, labo and discipline, of the prisoners, the school and library for th same, &c.

For the military prison at Alcatraz Island, California, (nc established by statute,) rules and regulations were adopted an published by an order of the Department Commander, date August 29, 1873, and revised and republished in August, 1880.

3. Regulations for the Soldiers' Home and the Na tional Asylum for Volunteers. As the inmates of the institutions are made subject by statute to the Articles of War and the former is placed under military direction, the regulatio for the same may properly be noticed here.

Soldiers' Home. By the Act of March 3, 1851, c. 25, entitle "an Act to found a Military Asylum," it is provided that certai designated officers of the army "shall be *ex officio* Commissione of the same," and these Commissioners are further empowere to establish from time to time regulations for the governme and direction of the institution, subject to the approval of th Secretary of War.[2]

Under this authority regulations were adopted on March 2 and May 30, 1851, which were revised October 8, 1866. A ne set was adopted January 31, 1883, which, however, was replace by a revised set—that now in force—of April 9, 1883, approve by the Secretary of War, April 17, 1883. These regulatio relate to the qualifications for admission to the Home, applic tions for admission, the rights and privileges of the inmates ar their government, the duties of the officers of the institutio function of the Board of Commissioners, &c.

Volunteer Asylum. By the Act of March 3, 1865, incorpo ating this institution, as amended by that of March 21, 1866, th designated Board of managers, who are also the corporation, a authorized "to make by-laws, rules and regulations, for carr ing on the business and government of the home, and to afl penalties thereto."[3]

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1. Secs. 4824, 4835, Rev. Sts. But see Chapter VIII.
2. Rev. Sts., Sec. 4815. Amended, and the Board of Commission reconstituted by Act of March 3, 1883, c. 130.
3. Rev. Sts., Sec. 4825.

Pursuant to such authority, there was adopted by the Board in 1866 a set of by-laws and regulations, consisting of 23 Articles, and relating mainly to the appointment and duties of the officers of the institution and the admission and disposition of its beneficiaries. In Art. 18, in which the duties of the "Governor" are set forth, it is provided that—"he shall from time to time make printed rules for the government of the employees and inmates of the Institution." Such rules have accordingly been made and published, in the form of General and Special Orders, &c., relating to military organization, discipline, labor, police, inspection, superintendence of shops, farm, &c., creation of a fire company, use and disposition of clothing, issue of quartermaster stores and tobacco, free postage, passes, and a variety of other subjects.

II. ORDERS.

All orders, written or oral, made or given by any competent authority, from the commander-in-chief to an acting corporal, are indeed in a general sense a part of the law military; their observance by inferiors being strictly enjoined and their non-observance made strictly punishable. The orders, however, to which reference is now to be made, are the formal, generally printed, Orders, issued by the highest authority of the Army or of some high command, and preserved as a part of the permanent records of the military establishment.

Orders of the President. As constitutional Commander-in-chief of the Army, and independently of course of any authorization or action of Congress, the President is empowered to issue orders to his command; and the orders duly issued by him in this capacity, while of but temporary importance as compared with his general army regulations, are obligatory and binding upon whom they concern, and so properly classed as a portion of the general law military. The validity and force of such orders have been repeatedly recognized by the authorities.[1]

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1. See II Opins. At. Gen., 225, 228, 232; V Id., 15; X Id., 14; The Thomas Gibbons, 8 Cranch, 427; U. S. *v.* Freeman, 1 Wood. & Minot, 50; Cowell *v.* Hopkinton, 45 N. H., 14.

Congress has, in some instances, expressly directed that certain matters "be published in General Orders." See Acts of June 25, 1864, c. 149, s. 2; July 4, 1864, c. 253, s. 6, 10.

Their form and contents. The orders of the President, commonly issued, are in the form of and designated as General a Special Orders; the latter which relate chiefly to individual cas not being, in practice, published to the army at large. Sin 1864, the orders announcing the action of the President upon tl proceedings of general courts-martial, which before were inco porated with the other General Orders, have been separate issued and numbered under the name of General Court Marti Orders.[1] Both General and Special Orders have formerly f considerable periods emanated directly from the Secretary War, who, in making and publishing the same, as in most of h other official proceedings,[2] acts as the representative and presur ably by the direction of the President.[3] Such Orders are no however, usually promulgated through the Headquarters of tl Army; although the provision of the Act of March 2, 1867, r *quiring* that "all orders and instructions relating to milita operations" should be "issued through the General of the Army, was *repealed* by the Act of July 15, 1870, c. 294, s. 15.

As has heretofore been noticed, the General Orders in force Feb. 17, 1881, were, by the authority and direction of the A of June 23, 1879, compiled and published by the Secretary War in connection with the existing Army Regulations, a printed therewith in the volume issued from the War Depa ment on the date first named: they were thus practically co verted into regulations.

The General Orders cover a great variety of particulars co nected with the discipline, employment, pay, clothing, subsis ence, quartering and transportation of the army, the providir

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1. Similar forms and designations are given to the Orders issued fro the Headquarters of Military Divisions and Departments, and of Armi in time of war.

2. In *all*, except where Congress has, as it may do, invested him wi independent powers or devolved upon him independent duties. Ke dall v. U. S., 12 Peters, 610.

3. Parker v. U. S., 1 Peters, 297; U. S. *v.* Eliason, 13 Id., 302; U. S. v. Freeman, 1 Wood & Minot, 50; Lockington's Case, Brightly, 28 In matter of Spangler, 11 Mich., 313, 322; I Opins. At. Gen., 380; VI Id., 457; X Id., 14; XIV Id., 458.

In some instances during the late war, orders termed "Executiv Orders" or "War Orders," were issued directly by the President in h own name, similarly to proclamations. See such orders in Vol. XI Stat. at Large, pp. 775–778; G. O., War Dept., of March 11, 186 Do. 252, 300, 331, of 1863; Do. 35, 100, 308, of 1864.

them with animals, arms, munitions, &c. As certain so-called "Regulations" are not properly classed as such, so a considerable proportion of the General Orders are not orders at all but *media* for the promulgation to the army of new legislation of Congress, regulations made or amended, appointments, promotions, &c., of officers, opinions of courts or law-officers, or other matters of information of value to the service. In time of peace indeed the Special Orders, by which direction is more commonly given as to the duties of inferior officers, changes of station, details of general courts, discharges of soldiers, &c., &c., are in a larger proportion orders proper than those designated as General. In connection with the General Orders are from time to time published "Circulars" to the army, the usual purpose of which is not to convey commands but to advise officers, &c., of matters of which they will properly take notice in the course of the performance of their functions and duties.

Orders of Military Commanders. Of a similar force and effect to the Orders of the President, though within a narrower range, are the General and General Court Martial Orders, and Special Orders, made and published by the superior military commanders, such as commanders of Divisions and Departments. As to the Orders thus promulgated in their general military capacity, these commanders directly represent, and exercise in a greater or less degree the authority of, the Commander-in-chief.[1] In the Orders in which they act upon the proceedings and sentences of courts-martial, they exercise an authority expressly conferred upon them by statute, though here too they act practically as substitutes for the Commander-in-chief. The very numerous Orders, especially of the latter character, issued during the late war, are a monument to the fidelity to duty and scrupulous regard for justice which have in general characterized our high commanders in war as well as in peace. In the thousands of these Orders published during that period from the headquarters of the various departments, divisions, districts, brigades, armies and army corps, the errors of law discovered have been strikingly few, and the cases in which justice has not clearly been duly administered most rare. To these Orders, as a most

1. See Lockington's Case, Brightly, 289; Clark *v.* Dick, 1 Dillon, 8; Napier, 57, 115.

valuable part of our military law and history, references have been abundantly made in the course of the following Chapters.

Principles governing Orders. As in the making of Regulations, so in the framing of Orders, the principles heretofore laid down to the effect that executive acts may not trench upon the province of legislation, or conflict with the existing constitutional or statutory law, are to be strictly observed.[1] Further, Orders should not conflict with established Regulations.[2] And Orders issued by commanders of departments or armies, or other military authorities inferior to the President, may not contravene the orders of the latter as Commander-in-chief.

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1. II Opins. At. Gen., 230–234; VI Id., 15. In an Act of March 3, 1863, two designated General Orders of the War Department, relating to enlistments, were in express terms "*rescinded*" by Congress.

2. II Opins. At. Gen., 230–234; X Id., 17.

CHAPTER IV.

THE UNWRITTEN MILITARY LAW.

While the Military Law has derived from the Common Law certain of the principles and doctrines illustrated in its code,[1] it has also a *lex non scripta* or unwritten common law of its own. This consists of certain established principles and usages peculiar or pertaining to the military status and service, and which, though unenacted, are recognized in the 84th article of war, under the designation of "the custom of war," as a means for the guiding of courts-martial in the administration of justice in doubtful cases. The same are also recognized by the courts and legal authorities as operative and conclusive as to questions in regard to which the written military law is silent.[2]

This unwritten law may be said to include:—1. The "customs of the service," so called; 2. The unwritten laws and customs of war.

1. Usages or Customs of the Service. These, whether originating in tradition or in specific orders or rulings, are now, *as such*, not numerous, a large proportion having changed their form by becoming merged in written regulations embraced in the General Regulations of the Army.[3] The regulations, for example, on such subjects as arrests, exchange or transfer of officers, devolution of command, furloughs, routine duties of officers and non-commissioned officers, escorts, salutes, councils of administration,

1. See I Opins. At. Gen., 233; VI Id., 204; Prendergast, 200.

2. Barwis *v.* Keppel, 2 Wilson, 314; Martin *v.* Mott, 12 Wheaton, 34; U. S. *v.* Macdaniel, 7 Peters, 14; U. S. *v.* Webster, Daveis, (2 Ware,) 42, 43, 56; I Opins. At. Gen., 699; II Id., 461; 1 Bishop, C. L., § 50; Cooley, Prins. Const. Law, 137; Prendergast, 53; Simmons, § 80; Clode, M. L., 128; O'Brien, 223; De Hart, 20; Kautz, Customs of the Service. For an *express statutory* recognition of "the usages and customs of armies," and "the custom and usage of the sea service," see c. 27, s. 8, and c. 24, s. 11, Acts of March 2, 1799.

3. Compare U. S. *v.* Webster, Daveis, (2 Ware,) 56; O'Brien, 223.

procedure of courts-martial,[1] &c., are in great part but the speci expression of usages of more or less early date, most of whi have come to us from the British service.

As to the procedure of military courts. Here, howeve *usage* still governs as to various important particulars. Thus reference to usage as furnishing the proper guide for the jud ment of the court upon the FINDING is not unfrequently requir to be made upon military trials, and especially as apposite to t question whether the facts alleged or proved constitute the mi tary offence charged. For example,—whether an order which t accused is charged to have disobeyed was a "lawful" orde whether the accused is to be considered as having been "on duty at the time of his alleged offence; whether an officer charged have been assaulted by a soldier was at the time "in the executi of his office;" whether certain acts amount to "conduct unbecor ing an officer or a gentleman," or to "conduct to the prejudice good order and military discipline;" in what acts consist t offences of false muster, mutiny, misbehaviour before the enem breach of arrest, or even desertion;—as to such questions, t court in deliberating upon its judgment, (as also the command in passing upon the same,) will constantly recur to the gener usage of the service as understood and acted upon by milita men.

Usage may also be authoritative in connection with the que tion of the punishment to be imposed by the SENTENCE. T Articles of war and the Regulations indeed specify nearly all t *species* of punishment to which an officer or soldier may be su jected; but to determine in some cases as to the *kind*, and most cases as to the *degree*, in amount or duration, of the pr posed punishment; to decide whether the same is sanctioned b custom or is "unusual;" as also in some instances to indicate direct as to the form of the execution of the penalty,—the cou (or the reviewing authority,) will not unfrequently have occasi to take into consideration the unwritten law or practice of t service.

2. Laws or Customs of War. These are the rules and pri ciples, almost wholly unwritten, which regulate the intercou and acts of individuals during the carrying on of war betwe

1. See Art. LXIII of the Regulations of 1881.

hostile nations or peoples. While properly observed by military commanders in the field, they may often also enter into the question of the due administration of justice by military courts in cases of persons charged with offences growing out of the state of war. Such laws and customs would especially be taken into consideration by *military commissions* in passing upon offences in violation of the laws of war. But courts-martial also, in time of war, may have occasion to recur to the same, upon trials of military offences peculiar to a state of war and expressly made cognizable by such courts by the Articles of war,—as, for instance, the offences of relieving an enemy, corresponding with or giving intelligence to an enemy, forcing a safeguard, and the offence of the spy.[1] And so, upon trials involving the rights or obligations of prisoners of war. In such cases the unwritten laws and customs of war, as generally understood in our armies or as defined by writers of authority, will often properly be consulted as indicating whether certain acts are to be regarded as constituting the offences charged, or what measure of punishment will be just and adequate in the event of conviction. Certain of these laws and customs will hereafter be referred to in considering particular Articles of war. In the main, however, they pertain to the separate Title of the LAWS OF WAR, the subject of PART II of this work.

Essentials of a Usage or Custom. As to what constitutes a usage or custom in law,—it is laid down by the authorities that it must consist of a uniform, known practice of long standing, which is also certain and reasonable,[2] and is not in conflict with existing statute or constitutional provision.[3] A civil cus-

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1. The original Article of war of 1806 in regard to spies provided that, on conviction, they should "suffer death according to the law and usages of nations."

2. U. S. *v.* Duval, Gilpin, 356; Collings *v.* Hope, 3 Washington, 149; U. S. *v.* Buchanan, 8 Howard, 102; Knights of Pythias' Case, 3 Brewst., 452; 2 Greenl. Ev., § 251; 2 Parsons, Con., 48; Lawson on Usages and Customs, 2–15. It must be so long-continued and notorious that all persons concerned may be presumed to have knowledge of it. Wadley *v.* Davis, 59 Barb., 503; Saint *v.* Smith, 1 Cold., 51.

3. Thompson *v.* Riggs, 5 Wallace, 680; The Floyd Acceptances, 7 Id., 677. "No erroneous practice of however long standing can justify the allowance of a claim" against "the true intent and meaning" of a statute. U. S. *v.* Freeman, 3 Howard, 564. Usage "arises from long

tom cannot set aside or modify the statute law,[1] or subsist in regard to any matter regulated by such law.[2] Moreover a prevailing usage is superseded when an enactment is made covering the subject: a usage can grow up or continue only in reference to a subject upon which the written law is silent or quite obscure. So, a usage or custom of war or of the military service, to be recognized and acted upon as such by a military court or commander, must have prevailed without variation for a long period, must be well defined, equitable, and uniform in its application, must not be prejudicial to military discipline, and must not only not be at variance with the statute or written law relating to the army but must pertain to a subject not provided for by such law.

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recognized rights countervened by no legislative action." Miller *v.* McQuerry, 5 McLean, 472. And see authorities cited in preceding note.

1. VI Opins. At. Gen., 73. But though usage cannot alter the statute law, it may be evidence of the construction given to it. U. S. *v.* Gilmore, 8 Wallace, 330; II Opins. At. Gen., 460; III Id., 363. It may also be evidence of the intent or purport of a regulation. II Id., 560, 705; VIII Id., 5. This is especially true of the usages of the executive departments of the Government. U. S. *v.* Gilmore; U. S. *v.* Lytle, 5 McLean, 17; U. S. *v.* Maurice, 2 Brock, 100.

2. "Generally, a statutory enactment controls all prior usages and laws, and establishes the rule which governs the subject-matter." U. S. *v.* Collier, 3 Blatchford, 332.

3. "In order to apply it" (the custom of war) "to any particular case it must be certain and well defined, and clearly not opposed to any law or regulation." De Hart, 20. There can be "no excuse for a practice which, with whatever good intentions, is forbid by law." G. O. 1, War Dept., 1861. "Customs of service can only be taken as precedents to follow, when intrinsically proper of themselves, and supplementary of the written law and regulations, on points on which the latter are silent, and when not in direct opposition to these." G. O. 2, Dept. of Texas, 1874. (Gen. Augur.) "The evidence of a custom to disobey a General Order was rightly rejected by the court. A custom, to be a good one, must not be contrary to law, or the law governing troops, but must be a general custom, a well-known custom to all the command." G. C. M. O. 2, Dept. of Va. & No. Ca., 1865. (Gen. Butler.) And see Hough, C. M., 372, 620; G. O. 4, Dept. of La., 1866; Do. 15, First Mil. Dist., 1870. That a custom of the service must be *uniform* is held by the court in U. S. *v.* Buchanan, Crabbe, 578, where, referring to an alleged usage in regard to the emoluments of pursers in the navy, it is said:—"A usage to be binding must be uniform and applicable to all officers of the same grade under similar circumstances." In IV Opins. 18, Atty. Gen. Legaré, in allusion to a supposed usage of courts-martial in regard to adjournments, says:—"This I understand to be the uniform practice; and uniform practice is good law in such cases when it is not unreasonable and works no wrong."

A ministerial officer, (as it has been observed by a U. S. Court,[1]) cannot institute a usage, but the same must be built up out of a series of precedents:[2] so, a custom of the service cannot be created by isolated or occasional instances,[3] or by the practice of a particular command or commander, but must be a usage of the army at large or of commanders in general. An illegal or unauthorized practice, however frequent or long continued, cannot constitute a legal usage.

Custom of the Service as a Defence. It will be apparent from the foregoing that an alleged military usage cannot avail an officer or soldier charged with a military offence, to vindicate his act, except where its existence and its lawfulness are susceptible of exact proof. "Custom of the service"—it is remarked in a General Order[4]—"is a treacherous tribunal, and it is a hazardous thing for an officer to appeal to it to justify failure to obey orders or a departure from strict compliance with the articles of war." The existence in a command of an unauthorized practice, sanctioned by a commanding or superior officer, may sometimes extenuate the act of a subordinate who adopts it, but, unlike a legal custom, it cannot serve as a *defence.*[5]

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1. U. S. *v.* Babcock, 4 McLean, 113.
2. See V Opins. At. Gen., 351.
3. U. S. *v.* Buchanan, 8 Howard, 102.
4. G. O. 42, Dept. of Washington, 1866. (Gen. Augur.)
5. In G. C. M. O. 1, Dept. of the Mo., 1885, the court, in connection with its sentence, observes:—"The court is of opinion that the following of an unauthorized and pernicious custom constitutes no good defence for any neglect on the part of the accused." [For "custom" the term should, strictly, have been *practice:* custom proper cannot, of course, fitly be described as "unauthorized."]

CHAPTER V.

THE COURT-MARTIAL—ITS HISTORY AND NATURE.

Having seen in what consists Military Law, we proceed to consider the tribunal by which it is mostly administered—the Court-Martial. The subject will be presented, in this and succeeding Chapters, under the following heads:—

I. The Origin and History of the Court-Martial.
II. Its Nature as a legal tribunal.
III. The Constitution of General Courts-Martial.
IV. The Composition of General Courts-Martial.
V. The Jurisdiction of General Courts-Martial.
VI. The Procedure of General Courts-Martial.
VII. The Inferior Courts-Martial.

THE ORIGIN AND HISTORY OF COURTS-MARTIAL.

Early Forms—The Franco-German System. Some form of tribunal for the trial of military offenders would appear to have coexisted with the early history of armies. In those of Rome justice was commonly administered by the *magistri militum*, and especially by the legionary tribunes, either as sole judges or with the assistance of councils.[1] Among the early Germans, judicial proceedings in time of peace were conducted by the Counts assisted by assemblages of freemen; in time of war by the Duke or military chief who, as heretofore remarked, usually delegated his jurisdiction to the priests who accompanied the army and carried its banners. At a later period arose courts of regiments, held either by the colonel or by an officer invested by him with the staff or mace called the *regiment*, as the emblem of judicial authority, and to which soldiers as well

1. Bruce, Insts., 295–300; Adams, Roman Ant., 330; De Chenier, Guide des Tribunaux Militaries, Introd.; Von Molitor, Kriegsgerichte und Militärstrafen, 11.

fficers were eligible as members: for the trial of high com-
ders the King convened courts of bishops and nobles.
ng the Middle Ages, however, the civil and military juris-
ons were as indicated in Chapter II, but imperfectly dis-
ished, and it was not till a comparatively modern date that
al courts administering distinctively military codes may
id to have been instituted.[1] In France, courts-martial, (*con-
de guerre*,) appear to have been first established by an ordi-
e of 1655, military persons having previously been subjected
e jurisdiction, successively, of the Mayor of the Palace, the
d Seneschal, the Constable, and the Provost Marshals.[2] In
any, courts-martial proper, (*militärgerichts*,) may probably
aced back to the articles, already referred to as earliest in
of the Emperor Frederick III of 1487: they were specifically
ided for—the remarkable "*spear*" court, (in which the as-
led regiment passed judgment upon its offenders,) being es-
ally characterized—in the penal code of Charles V, though
accurately defined in the articles of Maximilian II, of 1570.[3]
while, however, the Franco-German system of administration
tice, in which the courts were open, the prosecution was public
erbal, the accused was tried by a *jury* of his peers or mili-
associates upon specific charges and was permitted to be
l in his defence, and the proof was made by the examination
itnesses,—in contradistinction to the *inquisitorial* method
h was subsequently adopted,—had extended to England,
len and Russia, and prevailed generally throughout Europe.[4]
courts established by the codes and articles, (heretofore speci-
) of the sixteenth and seventeenth centuries[6] were courts
is system, and to such courts the present British and Ameri-
ourt-martial is more nearly assimilated in its procedure than
e now-existing military court of Germany or France.

itish Courts-Martial—*The Court of Chivalry.* In
English law, the original of the modern court-martial is dis-

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See Von Molitor; Ayala, de Judicüs Militaribus; Le Faure, Lois
ires de la France; De Chenier; Bruce, 300.

Le Faure, p. 141. And see Foucher, Code de la Justice Mili-
p. 3.

Koppmann; Von Molitor.

Von Molitor, Sec. 1 § 8.

See Chapter II.

See especially the Articles of Gustavus Adolphus, in Appendix.

covered in the "King's Court of Chivalry," or "Court of th High Constable and Marshal of England"—sometimes als designated as the "Court of Arms" or "Court of Honour"— which the judges were the Lord High Constable and Earl Ma shal. These officials, who date from the times of the Frankish-Carlovingian—Kings, are said to have formed a part of the *Au Regis* of William the Conqueror, but it was, apparently, not ti the subdivision of that tribunal into separate courts by Edwa I, in the latter part of the 13th century, that the Court of Chi alry began to have a distinct existence. Thus instituted, it can to exercise an extended jurisdiction, both civil and crimina taking cognizance not only of "all matters touching honor an arms," "pleas of life and member arising in matters of arms an deeds of war," "the rights of prisoners taken in war," an generally, of "the offences and miscarriages of soldiers contra to the laws and rules of the army," but also of civil crimes an matters of contract.[1] Having thus indeed gradually encroache upon the other courts of common law, the Court of Chivalry wa subsequently, by acts of parliament, restrained and curtailed much of its power; and, the office of High Constable having, a a permanent judicial function, been discontinued, upon the a tainder of the then Constable, in the 13th year of Henry VIII this tribunal, though at first held at intervals by the Marsha alone, fell into disuse. From a case adjudged in the Court Queen's Bench so recently as in the 1st year of Anne,[2] it is see that the Court of Chivalry, as held by the Marshal, still survive with a doubtful and trifling jurisdiction apparently rarely exe cised. But, though never abolished by specific statute, it had some time before the English Revolution, practically ceased t exist as a military tribunal.[3]

Later history. Upon its decadence, and during the interva

1. A corresponding jurisdiction was exercised in *naval* cases by th Lord High Admiral. Thring, 5; Clode, M. L., 41.

2. Chambers *v.* Sir John Jennings, 7 Mod. 127, and 2 Salk. 553.

3. Upon the history of the Court of Chivalry, see Coke, 4 Inst. 12 Hale, Hist. Com. Law, 42; Hawk., P. C., b. 2, c. 4; 3 Black. Com. 6 4 Stephen, Com. 329; Boyer, Com. Const. Law, 281; 2 Grose, 58–6 Tytler, 38–42, 46, 377–392; Adye, 1–12; 2 McArthur, 15–20; Pip & Col., 7-9; Clode, M. L., 83, 158; Id., 1 M. F., 76, 473; Pratt, Lieber, Observations on origin of military trials, &c., N. York, 187 Chambers *v.* Jennings, *ante; Ex-parte* Reed, 100 U. S., 20.

preceding the first Mutiny Act, justice was administered, in the military forces from time to time raised, mostly by martial courts or councils held under the ordinances or articles heretofore noticed,[1] or assembled by special commission issued under the royal prerogative, or what was arbitrarily assumed to be such.[2] During the reigns especially of the Tudors and Stuarts, and prior to the Petition of Right, military law, as administered, more nearly resembled the martial law than the military law of modern times; trials of civilians by courts-martial, and the imposition by the same of the death penalty, being sanctioned in cases in which the law of the land did not authorize such jurisdiction or punishment.[3] It was such arbitrary exercise of military authority which was probably had in view by Hale[4] and Blackstone[5] in their apparent confounding of military with martial law much to the disparagement of the former.

At length, by the original Mutiny Act of 1689, already described, the infliction of the death penalty within the Kingdom was prohibited except upon conviction of mutiny, sedition, or desertion, and the Sovereign, (for the first time by legislative authority,) was expressly empowered to grant commissions to convene courts-martial, whose jurisdiction and powers, extended and developed in subsequent Mutiny Acts and Articles of War, have finally—as has been seen in Chapter II—been established and defined in the Army Act of 1881. These powers, as compared with those of our own military courts, will be frequently referred to in the course of this treatise.

The American Court-Martial. The English military tribunal, transplanted to this country prior to our Revolution, was

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1. See Chapter II.

2. Grant *v.* Gould, 2 H. Black. 69, 84; Tytler, 48-58; Adye, 13-15; 2 McArthur, 20; Kennedy, 1; Pipon & Col., 9-12, 17-18; Pratt, 7.

3. 1 Black. Com., 414; Hallam, Const. Hist., vol. 1, pp. 325-330, 531; Manual, 7-8, cited in Ch. II, note. Col. Woodward's Essay on Mil. & Mar. Law, United Service Mag., Oct., 1879.

4. Hist., Com. Law, c. 2.

5. "Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance." 1 Black. Com., 413. And see VIII Opins. At. Gen., 365-6; also PART II—MARTIAL LAW.

recognized and adopted by the Continental Congress, in the fir American Articles of war of 1775, where the different courts-ma tial,—general, regimental, and detachment or garrison courts,- were distinguished, and their composition and jurisdiction d fined. These provisions were modified and enlarged in the su ceeding Articles of 1776 and 1786, and in the latter the authori to order general courts was more precisely indicated. Comir to the period of the Constitution—that instrument, while e pressly empowering Congress to provide for the government the army, and thus to institute courts-martial,[1] also recognized in the Vth Amendment—the distinction between civil offenc and those cognizable by a military forum.[2] But, in legislatir in view of these provisions, Congress did not originally crea the court-martial, but, by the operation of the Act of Sept. 2 1789,[3] continued it in existence as previously established. Thu as already indicated, this court is perceived to be in fact old than the Constitution,[4] and therefore older than any court of tl United States instituted or authorized by that instrument.

The revised code of Articles of war soon after enacted, *viz.* b the Act of April 10, 1806, repeated the provisions of 1786 in r gard to courts-martial, with some slight modifications consistin mainly in extending the authority to convene general courts an in substituting the President for Congress in the cases in whic the latter had previously been vested with final revisory authorit

These earlier codes, as also the later Articles, have been co sidered in Chapter II, and are set forth in the Appendix.

Between 1806 and 1874, a fourth court-martial—the field offi cer's court, authorized however only in time of war—was adde to those previously established; the authority to order gener courts was still further extended, and their jurisdiction an

1. See Dynes *v.* Hoover, 20 Howard, 79; *Ex parte* Reed, 100 U. S 21; *Ex parte* Biggers, 1 McM. 69; V Opins. At. Gen. 508.

2. *Ex parte* Mason, 105 U. S., 700; *Ex parte* Milligan, 4 Wallace 123, 137, 138; *In re* Bogart, 2 Sawyer, 396; Trask *v.* Payne, 43 Barb. 569; In matter of Martin, 45 Id., 142; People *v.* Daniell, 6 Lansing, 49 Rawson *v.* Brown, 18 Maine, 216; Rawle, Const., 220; Whiting, Wa Powers, 553; VI Opins. At. Gen., 425; Opin., Id., Mch. 15, 1882, (Ge Porter's Case.)

3. Providing that the Army should continue to be governed by th existing articles of war.

4. See Rawson *v.* Brown and People *v.* Daniell, above cited.

powers were enlarged. The legislation by which these changes were introduced has been heretofore indicated as embraced in the code of Articles contained in the Revised Statutes of June 22, 1874. These Articles, with some few subsequent enactments—of which the principal are the provision making accused persons competent as witnesses,[1] and that authorizing generals commanding Divisions and colonels commanding Departments to order general courts[2]—comprise the *existing statute law* in regard to the constitution, composition, jurisdiction, powers and procedure of American courts-martial. The *regulations* and *usages* relating to their forms and practice have already been referred to.

THE NATURE OF THE COURT-MARTIAL AS A LEGAL TRIBUNAL.

Its Authorization in the Constitution. By Art. 1, sec. 8, of the Constitution, Congress, as we have seen, is invested with the power to *govern* the army, as well as the militia when employed in the public service, and is further authorized to make all laws which may be necessary and proper to carry such powers into execution. Under these powers Congress has from time to time enacted articles of war and other laws specifically providing for the institution of courts-martial.

The Vth Amendment of the Constitution, heretofore cited, which in effect provides that persons charged with crimes shall be proceeded against by indictment, &c., except in military or naval cases, has also sometimes been viewed as a source of authority for courts-martial. Thus Atty. Gen. Cushing[3] observes of it that it "expressly excepts the trial of cases arising in the land or naval service from the ordinary provisions of law." And in the case, adjudged in New York, of Trask *v.* Payne,[4] the court say:—"This provision practically withdraws the entire category of military offences from the cognizance of the civil magistrate and turns over the whole subject to be dealt with by the military tribunals." In the view of the author, the Amendment, in the particular indicated, is rather a *declaratory recognition and sanc-*

1. Act of March 16, 1878, c. 37.
2. Act of July 5, 1884, c. 224.
3. VI Opins., 425.
4. 43 Barb. 569. And see *Ex Parte* Mason, 105 U. S., 700.

tion of an existing military jurisdiction than an original pr*vision initiating* such a jurisdiction.[1]

A further authority for the creation of courts-martial has be*held to be* attached to the constitutional function of the Pre*dent as* Commander-in-chief, independently of legislation—will be pointed out in the next Chapter.

Not a Part of the Judiciary but an Agency of t Executive Department. Courts-martial of the United Stat although their legal sanction is no less than that of the fede courts, being equally with these authorized by the Constituti are, unlike these, not a portion of the Judiciary of the Unit States, and are thus not included among the "inferior" cou which Congress "may from time to time ordain and establish In the leading case on this subject, the Supreme Court, referri to the provisions of the Constitution authorizing Congress provide for the government of the army, excepting milit offences from the civil jurisdiction, and making the Presid commander-in-chief, observes as follows:—"These provisi show that Congress has the power to provide for the trial a punishment of military and naval offences in the manner th and now practised by civilized nations, and that the power to so is given without any connection between it and the 3d arti of the Constitution defining the judicial power of the Unit States, indeed that the two powers are entirely independent each other."[2]

Not belonging to the judicial branch of the Government, follows that courts-martial must pertain to the executive depa

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[1] [illegible] the court say of this Ame [illegible] affirmation and preservat [illegible] military justice throu [illegible] And compa [illegible] People [illegible] Daniel [illegible]

[2] [illegible] *Ex parte* Brig [illegible] People [illegible] Daniel [illegible] note [illegible] remarked by [illegible] *commission* [illegible] sentence," is [illegible] granted to the co [illegible] States [illegible] Brig Gen [illegible]

ment; and they are in fact simply *instrumentalities of the executive power*, provided by Congress for the President as Commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein,[1] and utilized under his orders or those of his authorized military representatives.

A Temporary Summary Tribunal—not a Court of Record. As a purely executive agency designed for military uses, called into existence by a military order and by a similar order dissolved when its purpose is accomplished,[2] the court-martial, as compared with the civil tribunals, is transient in its duration and summary in its action.[3] Unlike the superior courts of record,[4] it has no fixed place of session, no permanent office or clerk, no inherent authority to punish for contempt, no power to issue a writ or judicial mandate, and its judgment is simply a recommendation not operative till approved by a revisory commander. It thus belongs to the class of minor courts of special and limited jurisdiction and scope, whose competency cannot be stretched by implication, in favor of whose acts no intendment can be made where their legality does not clearly appear, and which cannot transcend their authority without rendering their members trespassers and amenable to civil action.[5] But their proceedings, where no illegality is exhibited upon their face, will in general be presumed to be regular and valid.

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1. Clode, 2 M. F., 361, says of these courts in the British law:—"It must never be lost sight of that the only legitimate object of military tribunals is to aid the Crown to maintain the discipline and government of the Army." And see Id., M. L., 91; Prendergast, 148.

2. Mills *v.* Martin, 19 Johns. 33; Brooks *v.* Adams, 11 Pick. 442; Brooks *v.* Daniels, 22 Pick. 501; In the matter of Wright, 34 How. Pr. 211; 3 Greenl. Ev. § 470. "These courts are not permanent, but created *pro hac vice*, i. e. for the trial of the particular offender." Clode, M. L., 58.

3. "The discipline necessary to the efficiency of the army and navy required other and swifter modes of trial than are furnished by the common-law courts." *Ex parte* Milligan, 4 Wallace, 123. In Coleman *v.* Tennessee, 97 U. S., 513, the Court refer to the "swift and summary justice of a military court."

Compare the more permanent "Military Courts" established by Act of the Confederate States Congress, of Oct. 9, 1862, as given, with amendments, in Appendix, XV.

4. See *post*, p. 709 and note.

5. Upon the subject of the amenability of officers or soldiers to civil suit or prosecution, see Part III.

Not Subject to Judicial Revision. Further, the court-martial being no part of the Judiciary of the nation, and no statute having placed it in legal relations therewith, its proceedings are not subject to be directly reviewed by any federal court, either by *certiorari*, writ of error, or otherwise,[1] nor are its judgments or sentences subject to be appealed from to such tribunal. It is not only the highest but the only court by which a case of a military offence can be heard and determined; and a civil or criminal court of the United States has no more appellate jurisdiction over offences tried by a court-martial—no more authority to entertain a rehearing of a case tried by it, or to affirm or reverse its finding or sentence as such—than has a court of a foreign nation. In Dynes *v.* Hoover, above cited, this principle is well illustrated by the Court in the declaration that a duly-confirmed sentence of a court-martial "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever"; and further that with the legal sentences of competent courts-martial "civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise"—it is added—"the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation has been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts."[2]

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1. As to the incidental revision upon *habeas corpus*, see *post*.

2. 20 Howard, 81, 82. And see also *Ex parte* Reed, 100 U. S., 13 23; *Ex parte* Vallandigham, 1 Wallace, 243; Moore *v.* Houston, 3 S & R., 197; State *v.* Davis, 1 South. 311; *Ex parte* Dunbar, 14 Mass 393; Tyler *v.* Pomeroy, 8 Allen, 484; State *v.* Stevens, 2 McCord, 38 *Ex parte* Bright, 1 Utah, 148, 153; Whiting, War Powers, 278; Cooley Prins. Const. Law, 113; XII Opins. At. Gen., 332; Maltby, 151; DIGEST, 200.

In a few of the States the proceedings of *militia* courts-martial hav been held to be subject to review by the civil courts of appeal. State *v* Davis; Washburn *v.* Phillips, 2 Met. 296. But in the case of the Cor tested Election of Brig. Gen., 1 Strob. 198, the incongruity of a revie of the proceedings of a court-martial by means of a writ of *certiorar* issued by a civil court is well illustrated as follows. After remarkin that *certiorari* only lies to remove judicial acts, the court holds:— "The proceedings and sentences of courts military can hardly be con sidered judicial acts. * * * The very fact that the sentence of th court is not known until approved, then that the court is dissolved, an that the whole proceedings are in the possession of the officer orderin the court, show that the writ of *certiorari* cannot be awarded. For ther is no one to whom it can go, and who can, as of and for the court certify the proceedings. But that the Court of Sessions," (the civi

In the recent case of Wales *v.* Whitney,[1] a proceeding instituted against the Secretary of the Navy for the discharge on *habeas corpus* of an officer of the navy, the Supreme Court of the United States, in holding that no federal tribunal "has any appellate jurisdiction over the naval court-martial nor over offences which such a court has power to try," adds that no such tribunal "is authorized to interfere with" a court-martial "in the performance of its duty by way of a writ of prohibition[2] or any order of that nature."

Prohibition and Certiorari in England. In England, indeed, where all courts derive their original authority from the Sovereign as the "fountain of justice,"[3] and a relation, unknown to our law, exists between civil and military tribunals, a power to review the proceedings and sentences of courts-martial appears to have been at one time specifically recognized by the Mutiny Act as possessed by the superior courts of common law.[4] No such provision, however, was contained in the later Acts, and none such is to be found in the present statute law. But, independently of statute, it has been held that writs of *prohibition* and of *certiorari* may legally issue out of the High Court of Justice to courts-martial; *prohibition*, to forbid the court to proceed on the ground that it is without authority or jurisdiction; and *certiorari* to require it to certify up the record with a view to the quashing of conviction or sentence if found illegal.[5] It was also held,

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court applied to for the writ,) "has no right to pronounce a *military judgment* upon the proceedings being up, is itself conclusive against the writ." But see the late case of *Ex parte* Thompson, 2 Quebec L. R., 115.

1. 114 U. S., 564.

2. A writ of prohibition, (which is a means resorted to to prevent the doing of an act not yet performed or completed—U. S. *v.* Hoffman, 4 Wallace, 158,) has never been granted in a military case in this country; nor is one known ever to have been applied for in any case pending for trial before a military or naval court-martial prior to the very recent case of Paymaster General Smith, U. S. N., in which, in view of the ruling of the U. S. Supreme Court in Wales *v.* Whitney, the writ was refused by the Supreme Court of the Dist. of Columbia, Sept. 25, 1885.

Under Sec. 688, Rev. Sts., the U. S. Supreme Court has power to issue the writ of prohibition only in cases of admiralty pending in the U. S. Dist. Court. *Ex parte* Christy, 3 Howard, 322; *Ex parte* Gordon, 1 Black, 503.

3. 1 Black. Com., 266; 2 Stephen, Com., 538; Broom, Const. Law, 145.

4. Tytler, 167; I Opins. At. Gen., 236.

5. Manual, 151, 153; Grant *v.* Gould, 2 H. Black. 69; *In re* Mansergh, 1 Best & Smith, 400; Clode, M. L., 158.

however, that the former writ would not be granted on accoun merely of irregularities or informalities in the proceedings of th court-martial, or of an erroneous decision on the merits,[1] or afte the sentence had been executed, or because the sentence wa excessive;[2] and that *certiorari* was a proper remedy only wher the rights of the party affected by the judgment of the cour martial were *civil* rights, and the court had acted without juris diction,—that the writ would not issue where the rights affecte were of a military character, *i. e.* such as are attached to militar rank or status.[3] And it is a noticeable fact that the Britis courts have never granted *either* of these writs in a case tried o on trial by court-martial.

In fact the only *court of appeal* from the judgments of courts martial, in the British practice, may be said to be the Judg Advocate General.[4] So, with us, an Accused has always a appeal, from a conviction and sentence by court-martial, to th President, (or Secretary of War,) who, in entertaining and deter mining such appeal, is assisted and advised by the Judge Advo cate General of the Army.[5]

Revision collaterally, by Habeas Corpus, &c. Whil courts-martial, not being "inferior courts" to the Supreme Cour under the Constitution, cannot be appealed from to any civil court or controlled or directed by the decree or mandate of such a court yet in our U. S. Courts, similarly as in the English tribunals, the writ of *habeas corpus* may be availed of by a prisoner claiming to be illegally detained under trial or sentence of court-martial, and in this proceeding the legality of the action of the court—as whether it was legally constituted, or had jurisdiction, or its sentence was authorized by the code—may be inquired into. But the

1. Grant *v.* Gould, *ante.*

2. *In re* Poe, 5 Barn. & Adol. 681; Prendergast, 202. In the more recent (Irish) case of Sergt. McCarthy, 14 W. R. 918, it was held that "a prohibition will not issue merely because the evidence given in support of a military charge discloses a higher civil offence."

3. *In re* Mansergh, *ante;* Capt. Roberts' Case, Manual, 154.

4. "The Judge Advocate General's Department forms a Court of Appeal, and therefore takes no part in the actual preparation, conduct, or management of prosecutions." Jones, (1881,) p. 63. "The Judge Advocate General and his Deputy form a sort of *final court*, which has the power of upsetting, or "quashing," all court-martial proceedings." Gorham, (1880,) p. 37.

5. See Wales *v.* Whitney, 114 U. S., 575.

action must have been absolutely illegal and void in law to induce the federal court[1] to grant relief,[2] for a civil tribunal will not go into the merits of, or try, a military cause.[3] So, in a case before the Court of Claims,[4] or an ordinary civil court, where the right to recover pay, &c., depends upon the legality of the proceedings of a court-martial, the question whether the court has transcended its authority may be passed upon. So, such question may be tried in an action for damages for false imprisonment under sentence.[5] But these *collateral* methods of reviewing the action of military courts have not been frequent in practice, since it is well established that the civil judicature will not interfere in any case in which the court, however irregular may have been its proceedings, has acted or is acting within its legal powers and discretion.[6]

It may be noted that the law is similarly held by the authorities in the kindred class of cases in which the petitioner for the writ has not yet been tried or arraigned but is detained in military custody with a view to trial. If the person and the offence are within

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1. It need hardly be observed that a *State* court could have no jurisdiction in such a class of cases. See PART III.

2. In *Ex parte* Mason, 105 U. S., 697, the Supreme Court, in holding that it "has no power to review the judgments of courts-martial," adds that it cannot, upon *habeas corpus*, discharge a person under sentence of court-martial, "if the court had jurisdiction to try the offender for the offence with which he was charged, and the sentence was one which the court could, under the law, pronounce." In *Ex parte* Reed, 100 U. S. 23, the same court well say:—"A writ of *habeas corpus* cannot be made to perform the functions of a writ of error. To warrant the discharge of the petitioner, the sentence under which he is held must be not merely erroneous and voidable but absolutely void." And see *Ex parte* Parks, 93 U. S., 18; Bennett *v.* Hopkins, 2 McCrary, 129; King *v.* Suddis, 1 East, 306. In Wales *v.* Whitney, 114 U. S., 575, it is remarked that, even where the court-martial had in fact no jurisdiction, the power of the civil tribunal, on *habeas corpus*, "extends no further than to release the prisoner. It cannot remit a fine, or restore to an office, or reverse the judgment of the military court." But it is further held in this case that an officer merely in arrest at large, *i. e.* under an arrest confining him to the limits of the City of Washington, was not under such physical restraint as to be a subject of discharge on *habeas corpus*.

3. In the matter of Corbett, 9 Benedict, 277.

4. See Keyes *v.* U. S., 15 Ct. Cl., 553; Wales *v.* Whitney, 114 U. S., 575.

5. See PART III; also Wales *v.* Whitney, *ante*.

6. Barrett *v.* Crane, 16 Vt. 246; Brown *v.* Wadsworth, 15 Id., 170; Keyes *v.* U. S., 109 U. S., 336.

the jurisdiction of the proposed court-martial, the civil federal c will not enter into the merits of the charge, but will leave same to be tried by the military tribunal and remand the priso

Conclusiveness of its Judgments. Not being subje be reversed or appealed from, the judgment of a court-marti the United States is, within its scope, absolutely final and clusive.[2] Its sentence, if *per se* legal, cannot, after it has rece the necessary official approval, be revoked or set aside; and only by the exercise of the pardoning power that it can—if as yet executed—be rendered in whole or in part inoperativ

A Court of Law and Justice. Notwithstanding that court-martial is only an instrumentality of the executive po having no relation or connection, in law, with the judicial e lishments of the country, it is yet, within its field of actio fully a court of law and justice as is any civil tribunal.[4] court of law, it is bound, like any court, by the fundamental p ciples of law, and, in the absence of special provision on subject in the military code, it observes in general the rul evidence as adopted in the common-law courts.[5] As a cou justice, it is required, by the terms of its oath, to adjudicat tween the United States and the accused "without partia favor, or affection," and according, not only to the laws and toms of the service, but to its "conscience,"[6] *i. e.* its sens substantial right and justice unaffected by technicalities.

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1. *In re* Bogart, 2 Sawyer, 396; *In re* White, 8 Id., 49; *In re* Mc U. S. Dist. Ct., Cal., April, 1885.

2. Warden *v.* Bailey, 4 Taunt. 76; Frear *v.* Marshall, 4 F. & F. Dynes *v.* Hoover, 20 Howard, 83; *Ex parte* Reed, 10 Otto, 13; Bogart, 2 Sawyer, 396; Moore *v.* Houston, 3 S. & R. 197; Brow Wadsworth, 15 Vt. 170; People *v.* Van Allen, 55 N. Y. 36; Sta Stevens, 2 McCord, 38; *Ex parte* Bright, 1 Utah, 145; Porret's C Perry, 419; XI Opins. At. Gen., 139; Opin. Id., March 15, 1882, (Porter's Case.) "Within the sphere of their jurisdiction the judgm and sentences of courts-martial are as final and conclusive as tho civil tribunals of last resort." Hoffman J., in *In re* McVey, U. S. Ct., Cal., April, 1885.

3. See DIGEST, 237, 389–390, 439, 453. This subject is further i trated in Chapter XXV—"NINETY-NINTH ARTICLE."

4. XI Opins. At. Gen., 138, 139. And see the other authoritie above cited.

5. See Chapter XVIII—EVIDENCE.

6. See the 84th Article of war.

A Court of Honor. A court-martial has been called a "court of honor," and this designation, though less employed than formerly, is still applicable to it for the reason that it punishes dishonorable conduct where the same affects the reputation or discipline of the army. It may try an officer for not being also a gentleman—a dereliction not cognizable by any other species of tribunal. But though in this a court of *honor*, it is at the same time a court of *law*, since it proceeds against such conduct as an offence to be charged and proved according to the rules of criminal pleading and evidence.

As assimilated to a Civil Judge and Jury. As illustrating the function of a court-martial to administer law and justice, it may be noted that this court, though an "exceptional forum,"[1] is not without close analogies in its *personnel* to the ordinary civil tribunals. Thus it has frequently been compared, as to some of its powers and proceedings, to a *judge*, and as to others to a *jury*.[2] Indeed, in its taking of a statutory oath, its being subject to challenge, its hearing and weighing of evidence, its finding of guilt or innocence, and its liability to be reassembled to reconsider its verdict, it nearly resembles a traverse jury in a criminal court. On the other hand, in its arraignment of the accused, its entertaining of objections to its own jurisdiction as well as to the sufficiency of the pleadings and the competency of the testimony, its authority to grant continuances and to adjourn, and its power to impose sentence, it is more closely assimilated to the judge. The further comparison by Atty. Gen. Cushing[3] of a court-martial to a "*grand jury*," in that its members are "changeable in numbers and personality within certain limits," is a much less obvious analogy.

A Criminal Court. In regard to the class of courts to which it belongs, it is lastly to be noted that the court-martial is strictly a criminal court.[4] It has in fact no civil jurisdiction whatever; cannot enforce a contract, collect a debt, or award damages in

1. VI Opins. At. Gen., 204.

2. Sullivan, 17; Adye, 167; Tytler, 221; 1 McArthur, 274; Delafons, 121; Hough, 944; Simmons, § 637; Griffiths, 168; Harcourt, 128; McNaghten, 117, 122, 124, 127; Bombay R., 30; Macomb, 31; III Opins. At. Gen., 398; V Id., 707; VI Id., 206; VII Id., 340; X Id., 65.

3. VII Opins., 340.

4. DIGEST, 207; U. S. *v.* Clarke, 96 U. S. 40.

favor of an individual. All fines and forfeitures which it decre accrue to the United States. Even where it tries and convic an accused for an offence involved in an obligation incurred injury done to another person, whether a military person or civilian—as in the case of an officer guilty of dishonorable co duct in the non-payment of private debts, or in that of a soldie who has stolen from a comrade or trespassed upon a citizen—i cannot adjudge that the debt be paid, that the property be re turned, or that its pecuniary value or the amount of the damage be made good to the party aggrieved. Its judgment is a crimina sentence, not a civil verdict: its proper function is to award *pun ishment* upon the ascertainment of guilt.[1]

The nature and characteristics of the Court-Martial will b abundantly illustrated as we proceed with the details of its power and practice.

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1. DIGEST, 207, 271; 3 Greenl. Ev. § 469, 471, 476; Warden v Bailey, 4 Taunt. 78.

CHAPTER VI.

THE CONSTITUTION OF GENERAL COURTS-MARTIAL.

The law authorizing and relating to the constituting of general courts-martial—(the subject of the constituting, &c., of *inferior* courts will be considered hereafter—) is contained in the provision of the Constitution making the President the Commander-in-chief of the Army, in the Seventy-Second and Seventy-Third Articles of war, and in Secs. 1230 and 1326 of the Revised Statutes. By this law the authority to constitute these courts is vested in—I, The President; II, Certain military commanders.

I. AUTHORITY OF THE PRESIDENT TO CONSTITUTE GENERAL COURTS-MARTIAL.

The President is empowered to institute courts-martial—1st., as Commander-in-chief under the Constitution; 2d, in the special contingency indicated in the 72d Article; 3d, in the particular cases provided for by Sec. 1230, Rev. Sts.

1. **As Commander-in-Chief.** The Articles of war, unlike those for the government of the navy,[1] do not expressly designate the President as one of the officials invested with a general authority to order general courts-martial, but declare, in Art. 72,[2] that the same may be convened by certain military commanders,

1. See Rev. Sts., Sec. 1624, Art. 38.

2. This Article, as amended by the recent Act of July 5, 1884, is as follows:—"ART. 72. *Any general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department, may appoint general courts-martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case.*"

except in a certain specified contingency, (hereafter to be defined,) when—it is provided—the court shall be ordered by the President. And it has been argued, on the principle—assumed to be applicable—of *expressio unius exclusio alterius*, that the President was thus legally empowered to exercise the authority in question only in the cases embraced in the exception.

But as the law is now generally held, and in the opinion of the author, the President is invested with a general and discretionary power to order courts-martial for the army, *by virtue of his constitutional capacity as Commander-in-chief, irrespectively and independently of any article of war or other legislation of Congress.* In this view the 72d Article is construed simply as an enabling statute, indicating what military commanders "may," for the purposes of discipline, (and to relieve, while representing the Commander-in-chief,) "appoint"[1] such courts; the exception expressed in the second clause being regarded as a recognition of and reference to the President, as the source of military command, for the purposes of the exercise by him in person of the authority in a particular class of cases where his subordinates cannot justly or properly act.

Original authority of British sovereign to convene courts-martial. By the common and statute law of Great Britain down to the period of the first Mutiny Act, the King was vested with the supreme command and government of the army; a function which necessarily included the power to constitute courts-martial.[2] Nor, in the author's opinion, was this power exercised from an early period, divested by the Mutiny Act o

1. The amended Article has been recurred to the form of expression employed in the code of 1800. The form in the Article of 1874, before the amendment, was—"shall be competent to appoint." It may be observed that the antiquated term *appoint*, still retained in the Article is not often used in practice; such equivalent forms as order, convene, assemble, detail and constitute being employed, indifferently, instead.

2. See Samuel, 34, 53, 55, 64, 65, 134. The extent of this power, as understood at the time, appears from the well-known statute of 13 & 14 Car. 2, "passed," in the words of an English writer, (Law Mag., vol. XIV, (1845,) p. 4,) "for settling all disputes on this important subject," of which the preamble runs as follows:—"Forasmuch as within all his majesty's realms and dominions, the sole and supreme power, government, command, and disposition of the militia, and of all the forces both by sea and land, and of all forts and places of strength, is and by the law of England ever was, the undoubted right of his majesty and his pred

1689.[1] This Act did not assume in terms to authorize the Crown to convene military courts in general, but, in view of the emergency which had induced its enactment, while condemning the exercise of martial law and the arbitrary infliction of the penalty of death, it made special provision for the assembling of such courts by "their Majestyes", &c., for the trial, within the Kingdom, and punishment capitally if found necessary, of three offences of particular gravity, which, in time of peace at least, in the absence of such provision, would legally have been punishable, or punishable with death, within the realm, only by the civil courts.[2] That the Act was not intended to impair, and in fact left intact, the original function of the Sovereign to order courts-martial for the trial of military offences seems to be the soundest conclusion, and such is apparently the conclusion of Samuel,[3] the principal of the earlier, and Clode,[4] the most recent, of the commentators on the Mutiny Act. That this is the proper view is confirmed by the consideration that in the larger measure of its exercise, *viz.* in respect to the constituting of courts-martial outside the Kingdom, and for the trial of offences other than mutiny, sedition, and desertion within the Kingdom, this branch of the prerogative remained for a long period acquiesced in and acknowledged by the Legislature.[5] Later Acts which recited that it "shall be lawful" for the Sovereign to institute courts-martial generally, should, it is believed, properly be regarded as mainly of a *declaratory* effect.[6]

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cessors, kings and queens of England; and that both, or either, of the houses of parliament cannot and ought not to pretend to the same," &c. This prerogative, observes Samuel, (writing in 1816,) is "as complete at this day as in precedent times;" and, as illustrating the same, he declares that—"as connected with the fulness of the kingly authority over the military state, to the Crown it has always belonged to make laws or ordinances for the economy, discipline and government of the army, *and to appoint and erect tribunals for the administration and enforcement of them throughout the same.*" (pp. 53, 162.)

1. See Samuel, 162, 163.
2. See Clode, M. L., 19, 91.
3. Page 163.
4. M. L., 91, 92. On my reading this passage to Mr. Clode in person, he assured me that I had not misapprehended his view.
5. See Simmons § 2; Clode, M. L., 21; Samuel, 203.
6. The provision of the existing British "Army Act," in regard to the authority to convene general courts-martial, *viz*,—"A general court-martial shall be convened by Her Majesty, or some officer deriving authority immediately or mediately from Her Majesty."—certainly seems to be declaratory of a prerogative of the Crown in this particular.

Law and practice as to the exercise of the authority by the President. In this country, prior to the adoption of the Constitution, Congress, which exercised the entire power of the government, executive as well as legislative, while itself expressly directing the institution of courts-martial in some cases,[1] in general devolved the authority for this purpose upon the commander-in-chief of the army and the generals commanding in the separate States. To the *latter* this authority was expressly delegated by Congress, by resolution of April 14, 1777,[2] but it is noticeable that the authority, as ascribed to and exercised by the *commander-in-chief*, rested upon no express grant but was apparently derived mainly by implication from the terms of Washington's commission by which he was vested with 'full power and authority to act as he should think fit for the good and welfare of the service,' and enjoined to cause "strict discipline and order to be observed in the army."[3] Considerably later, in the Articles of 1786, the authority was in terms vested in "the general or officer commanding the troops."

Upon the adoption of the Constitution and the division of the powers of the government, the executive power, previously exercised by Congress, was transferred to the President, and with it the function of commander-in-chief. This function was not defined by the Constitution. To it therefore were properly to be regarded as attached, (with such modifications as the new form of the government required,) the powers originally vested in Congress and delegated by it as above indicated to the com-

1. See 1 Jour. Cong., 329, 427; 3 Id., 244, 686.

2. The codes of articles of 1775 and 1776, though conferring, respectively, upon "the general or commander-in-chief" the power to pardon or mitigate punishments, and the power to act upon sentences, omitted to make provision for the *convening* of general courts.

3. The commission in full, as "agreed to," by Congress, is given in 1 Journals, 85. That the powers here conferred were regarded as including authority to order military courts is evident from a letter from Washington to Maj. Gen. Gates, of Feb. 14, 1778, (Sparks' Writings of Washington, vol 5, p. 236,) in which, in expressing the opinion that the power of appointing such courts was "too limited," he observes—"I do not find it can legally be exercised by any officer except the commander-in-chief or the commanding general in any particular State." The subsequent resolution of Congress, of April 10, 1782, (4 Journals, [illegible]) "That the Secretary of War shall, in the absence of the commander-in-chief, be empowered to order the holding of general courts-martial in the places where Congress may be assembled"—is a legislative recognition of the existence of the power in the commander.

mander-in-chief of its army, and which had been exercised by the latter up to this period. Among these powers was the authority, properly incident to chief command, of issuing to subordinates and the army at large such *orders* as a due consideration for military discipline might require, and, among these, orders directing officers to assemble and investigate cases of misconduct and recommend punishments therefor—in other words orders constituting courts-martial. The Constitution had indeed vested in the new Congress the power to legislate for the regulation and government of the army, but this provision could not rightly be regarded as *per se* militating against the exercise of an authority properly inhering in a function devolved by the same instrument upon the Executive, and which had been attached to that function by the previously-existing law and usage.[1]

That the right of the Commander-in-chief to exercise this power was not seriously questioned would appear from the practice of the early Presidents by whom it was exercised in most important cases.[2] Subsequent Presidents employed the same authority from time to time, both in peace and in war,[3] and during the late civil war it was repeatedly resorted to and in conspicuous instances.[4]

Meanwhile, indeed, the provision of 1830, now incorporated in the second clause of the 72d Article, had specially devolved it upon the President to appoint the court whenever the military commander, otherwise competent for the purpose, should happen to be the "accuser or prosecutor" of the officer to be tried; but the authority of the President to order such courts, generally and at discretion, *as commander-in-chief*, continued to be exercised irrespective of such provision. Otherwise indeed it would have resulted that many officers and soldiers, not under the command of a "department" or "army" commander, including general officers, certain officers of the general staff, cadets of the Military Academy, and sundry enlisted men of the Engineer Battalion, or Ordnance or Signal corps, or acting as clerks in the War Depart-

1. Among the principal cases in which the courts were ordered by Washington as Commander-in-chief, were those of Gens. Arnold, Lee, Schuyler and St. Clair, Cols. Graham and Zedwitz, and Lt. Col. Enos.

2. As in those of Brig. Gen. Hull and Maj. Gens. Wilkinson and Gaines, tried in 1813–1816.

3. As in the cases of Gens. Talcott and Twiggs, Col. Sumner, Lt. Col. Montgomery, and Majors Crittenden and Cross.

4. As in the cases of Brig. Gens. Hammond, Gordon and Paine.

ment, would, prior to 1874, (or, in the case of the cadets, 1873, have remained exempt from amenability to military justice, t the serious prejudice of discipline.

The enactments of 1873 and 1874, enabling the Superintend ent of the Military Academy and the General of the Army t convene general courts, have reduced in number the occasion for the exercise of this power by the Commander-in-chief, bu the same is still asserted in proper cases and has been resorted t in recent important instances.[1]

The authority in question, however, does not rest wholly upo executive practice and precedent. In the leading case of Majo Runkle, where the point was specifically raised, it was held b Judge Advocate General Holt in 1872 that the convening of th court by the President in his capacity of commander-in-chief wa a legal act;[2] and this opinion, adopted by the Secretary of War a the time, has subsequently been sustained by the Attorney Gen eral[3] and also by the Judiciary Committee of the Senate in a repor on the same case in 1879.[4] A similar conclusion had previously been arrived at by the Military Committee of the House of Rep resentatives in Lt. Col. Woolley's Case in 1832,[5] and had als been expressed by Maltby,[6] Macomb[7] and De Hart,[8] in thei treatises. Later writers on military law have adopted the same view,[9] and the same was also declared by distinguished department and army commanders in Orders, during the late war.[10]

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1 As in those of Cadet J. C. Whitaker, (Dec. 1880;) Major J. H. Taylor, (Aug. 1882;) Brig. Gen. Swaim and Lieut. Col. Morrow, (June, 1884;) Brig. Gen. Hazen, (March, 1885.) The power is also recognized in the Army Regulations of 1881, par. 919.

2 Digest, 53, 388-9.

3 XV Opins. 302–3, note. The author's previously prepared MS on the subject under consideration was furnished to the officer of the Dept. of Justice by whom this note was drawn.

4 Report No. 868, 45th Cong., 3d Sess., March 3, 1879.

5 Am. State Papers, Mil. Affairs, vol. 4, p. 854.

6 Pages 18, 142, 146, 147.

7 Edit. of 1809, p. 8; edit. of 1841, p. 13.

8 Pages 5, 6.

9 Cuyler 11; Lee, 86-7; Ives, 30.

10 G. C. M. O. 12, Army of the Potomac, 1864, (Gen. Meade;) G. C. M. O. 42, Dept. of the Cumberland, 1864, (Gen. Thomas;) Do. 27, Dept. of the West, 1864, (Gen. Pope;) Do. 160, Dept. of the Ohio, 1863, (Gen. Burnside;) Circ., Dept. & Army of the Tenn., Jan'y 16, 1865, (Gen. Howard.)

Thus resting upon law, authority and precedent, this power may now be regarded as no longer open to serious question.[1] That it may be exercised by the President in his own name or through the Secretary of War is also well settled.[2]

2. Under the 72d Article of War. In the second clause of this Article it is provided that when a military commander, authorized by the first clause to "appoint" a general court-martial, is the "accuser or prosecutor" of an officer of his command proposed to be brought to trial, the court shall be appointed by the President.[3]

This provision was introduced into our military law by an Act of May 29, 1830, as an amendent to the 65th article of the then existing code. Its purpose clearly was to debar a superior from selecting the court for the prosecution and trial of a junior under his command, and, as reviewing authority, passing upon the proceedings of such trial, or executing the punishment, if any, awarded him, in a case where, by reason of having preferred the charge or undertaken personally to pursue it, he might be biased against the accused, if indeed he had not already prejudged his case.[4] The Article wholly divests such superior of power to

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1. Since the above was written, the power has been further affirmed in a Report of the Judiciary Committee of the Senate of February 18, 1885, and by the Court of Claims, in the case of Runkle *v.* U. S., 19 Ct. Cl., 396.

2. G. O. 35, War Dept., 1850; Coppée, 47; DIGEST, 389.

3. It may be noted that this provision does not apply to trials of *enlisted men;* also that, equally with a similar provision of the succeeding (73d) article, it does not apply to trials by inferior courts. *On principle*, however, it should be applied to such courts where it can be done "without serious embarrassment to the service." DIGEST, 56. In a case in G. O. 11, Dept. of Texas, 1866, it was applied to a trial by *military commission.*

4. "The object of this provision is just and beneficial. It is intended to prevent the packing of a court, and still more perhaps to prevent the suspicion of such packing." O'Brien, 227. And see G. O. 11, Dept. of the Ohio, 1866; also the opinion of the At. Gen. in case of Capt. Coleman, of August 2, 1882.

The occasion of this legislation was the trial of Col. R. Jones, Adjutant General, by a court convened by Maj. Gen. Macomb, then commanding the Army, who preferred the charges, was the prosecuting witness, and was also the reviewing authority who approved the sentence. See the proceedings published in G. O. 9 of March 13, 1830.

In the present practice, where a court-martial is ordered by the President, not as Commander-in-chief, but in compliance with this statute,

order the court, "nor could such power be imparted to him otherwise than by a special legislative act.[1]

Construction of terms "accuser" and "prosecutor." As indicated by the use of the disjunctive "or," these terms are evidently intended to bear a somewhat different signification. To distinguish therefore the two designations—"*accuser*" is construed to mean one who either originates the charge or adopts and becomes responsible for it; "*prosecutor*" one who proposes or undertakes to have it tried and proved. It is not essential that the accuser or the prosecutor should be the principal, or what is sometimes termed the "prosecuting," witness, or indeed that he should be a witness at all. The characters of accuser and prosecutor, though distinct, may be united in the same person, indeed where a commander is in fact the "accuser," he will, in the majority of cases, be found to be also the true prosecutor.

Whether a commander who has taken action in the case of an officer of his command proposed to be tried,—as by ordering his arrest, directing the preferring of charges, approving charges as preferred, &c.,—is to be considered as an accuser or prosecutor in the sense of this Article, so as to disqualify him from ordering the court and to make it necessary for the President to do so, is a question depending mainly upon the relation and *animus* of such commander toward the accused or the case. Where his action has been merely official, the capacity indicated cannot in general properly be ascribed to him. Thus, where, upon the facts of the supposed offence being reported to him, and appearing to call for investigation by court martial, he has, *as commander*, directed some proper officer, as the commander of the regiment or company of the accused, or his own staff judge advocate, to prepare the charges, indicating or not their form, or has approved or revised charges already prepared, he is not to be regarded as an "accuser" in the sense of the Article, his action having been official and in the line of his duty. Nor is he to be deemed a "prosecutor" merely for the reason that, having personal cogniz-

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[illegible] under the 72d Article of War. [illegible] of 1876; 79 Id., [illegible]

[illegible]

ance of the facts of the case, he contemplates being a material and important witness on the trial.[1]

On the other hand, where, having personally originated or adopted the charges, he has himself preferred them as his own, or caused them to be preferred nominally by another for him,[2] with the purpose of having them brought to trial, he is in general properly the "accuser," even if he may occupy no hostile or adverse position toward the accused. So, if, influenced by hostile feeling, or by a conviction that the accused is guilty and that his offence demands to be promptly and efficiently dealt with, he proposes, upon assembling the court, actively to promote the prosecution, as by instructing the judge advocate, facilitating the attendance of witnesses for the prosecution, appearing himself as prosecuting witness, &c., he is properly to be deemed a "prosecutor" within the meaning of the Article, and it will not be legal for him to order the court, but the President must be resorted to for the purpose.

It may be remarked that the action of the commander, to have disqualified him from convening the court must have been taken by him *of his own will*, and not merely in compliance with orders. Thus where a commander, by the direction or at the instance of the President or other official superior, has caused a subordinate to be arrested and charges to be preferred against him, and thereupon assembled a court for his trial, the proceedings or sentence of such court can not be called in question under the Article.[3]

The same facts and considerations which are pertinent to the inquiry as to the attitude of the commander toward the case *before* a court has been ordered, are equally so when, the court having been assembled, the accused is arraigned, or at any subsequent stage of the proceedings.[4] In the majority of cases, the issue upon the point, whether the commander who convened the court was or not the accuser or prosecutor of the accused, has been raised by the accused either at the trial, or subsequently before the reviewing authority and especially before the President. Regularly, indeed, where the accused is informed as to the action, and *animus* of the commander in the case, he should properly take the objection at the arraignment; but as the constituting of

1. Compare DIGEST, 54–55; G. O. 25, Dept. of Fla. 1866, (remarks of Gen. Foster;) XVI Opins. At. Gen., 106.
2. See case in G. O. 11, Dept. of the Ohio, 1866.
3. DIGEST, 55.
4. DIGEST, 53. And see XVI Opins. At. Gen., 106.

a court-martial in contravention of the prohibition of the Artic necessarily nullifies its proceedings *ab initio*, the question of th legality of a court claimed to have been thus constituted may b raised at any time either during or after the trial.[1]

The exception being taken at the trial, the original charge, a preferred and signed, will be significant evidence. If this, how ever, is not forthcoming, or does not, (as it more frequently wil not,) exhibit the precise relation of the commander to the cas other evidence relevant to this relation may be introduced a upon the trial of any other issue. The accused, if necessary, ma even call upon the commander himself to be sworn and examined

In view of the positive provision that, in the event of the con tingency specified in the Article, the court is to be ordered by th President, it would scarcely be worth while to notice that n *intermediate* commander could exercise this authority, were i not for the fact that this point has actually been passed upon b the Secretary of War. This was in the case of Capt. Mackenzie who was brought to trial, in July, 1845, before a general court martial, which, the charges having been preferred by the depart ment commander, was ordered by Brig. Gen. Wool, commandin the "Eastern Division." The question of the authority of th latter, under the circumstances, having been submitted to Mr Marcy, then Secretary of War, he of course decided that th order of the Division commander was illegal, and dissolved th court.[2]

3. Under Sec. 1230, Rev. Sts. This Section is as follows:— "*When any officer, dismissed by order of the President, makes, i writing, an application for trial, setting forth, under oath, that h has been wrongfully dismissed, the President shall, as soon as th necessities of the service may permit, convene a court-martial, t try such officer on the charges on which he shall have been dismisse And, if a court-martial is not so convened within six months fro the presentation of such application for trial, or if such court, bein convened, does not award dismissal or death as the punishment such officer, the order of dismissal by the President shall be void.*

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1. Compare the case in XVI Opins., 106. The right of the accus to know whether the convening commander may not be the accuser prosecutor in the case was recognized on Gen. Porter's trial. Print Record, p. 10–11.

2. This case is referred to by De Hart, p. 7, and note.

This provision was originally enacted in s. 12 of the Act of March 3, 1865, c. 79. In this form it applied, in terms, to officers "who may be hereafter dismissed," *i. e.* after its date; and it has been held, successively, by the Judge Advocate General and the Solicitor General[1] that the fact that the word "hereafter," or some equivalent term, was not employed in the provision, as incorporated in the Rev. Sts., did not extend the application of such provision, or give it a retroactive effect so that an officer who had been dismissed in 1863 could be allowed a trial under it.

It is further evident that, under the existing law—Sec. 1229, Rev. Sts., and the 99th Art. of war—which prohibits summary dismissals of officers by the President in time of peace, the Section under consideration is operative and available only in time of war, or in cases of officers dismissed in war.[2]

It has been held by the Judge Advocate General,[3] in whose opinion the Attorney General has since concurred,[4] that officers *dropped for desertion* under Sec. 1229, Rev. Sts., were not of the class of dismissed officers contemplated by Sec. 1230, and so not entitled to apply for a trial under the latter statute.

The Section is incomplete in that it fails to prescribe a limit of time within which the application for a trial shall be made. It can thus only be said that it should be made within a reasonable time,[5] and what is a reasonable time will of course depend upon the circumstances of the particular case. If not made within a reasonable time, the officer will be deemed to have acquiesced in his dismissal and waived his right to the trial.[6]

The Section, moreover, does not prescribe as to the *contents* of

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1. DIGEST, 242; XVI Opins. At. Gen., 599.

2. For the few cases in which officers availed themselves of this statute at the end of the late war see G. C. M. O. 539, 568, 636, 637, of 1865; Do. 118 of 1866. In one of these cases the officer was re-dismissed; in one he was awarded a punishment less than dismissal, *viz.* forfeiture of pay, and the original dismissal was accordingly declared void; in the other three he was acquitted, with a like result.

3. DIGEST, 243.

4. Opin. of Feb. 16, 1881.

5. So held by the Judge Advocate General, (DIGEST, 242;) the Attorney General, (Opin., Feb. 16, 1881;) and the Court of Claims, (18 R. 435,)—in Lieut. Newton's Case, in which also the opinions above cited were mostly given. In G. O. 112 of 1865, prescribing regulations for carrying into effect the Section under consideration, it was directed that "Applications for trial under this Act must be made as soon as practicable after receipt of notice of dismissal."

6. Newton *v.* U. S., 18 Ct. Cl. 435. In this case nine years had elapsed between the dismissal and the application.

the application, except that the applicant shall set forth therein "that he has been wrongfully and unjustly dismissed." In practice, applications which merely followed this form of words, without specifying in what the alleged wrong or injustice was claimed to consist, have been accepted as sufficient. A more specific statement, however, would be preferable.[1]

It is to be observed, as a further peculiarity, that a court-martial ordered under this Section differs from all other courts-martial in that, if it fails to impose one of the sentences indicated in the Section, its judgment takes effect without the approval of the convening authority. If it acquits the party, or does not sentence him to death or to be dismissed, his original dismissal is by such action vacated instanter and he is restored to the army, and the approval or disapproval of the President can affect in no manner this result.

This statute has thus far been viewed as constitutional, but its constitutionality may well be questioned. The Attorney General indeed has passed upon this question,[2] holding the Section to be within the power of Congress to legislate for the government and discipline of the army, and not to be "obnoxious to the objection that it invades or frustrates the power of the President to dismiss an officer. On the contrary," he adds, "it proceeds upon an admission that the power of dismissal belongs to the President. It is simply a regulation which is to follow a dismissal, providing in certain contingencies for the restoration of the officer to the service and leaving the dismissal in full force if those contingencies do not happen." But the power of dismissal can hardly be deemed substantial if thus liable to be nullified at any time within an indefinite period, and moreover a statute which authorizes a court-martial not only to try a civilian, but practically to appoint him to the army, is certainly subject to serious question.[3]

II. AUTHORITY OF MILITARY COMMANDERS TO CONSTITUTE GENERAL COURTS-MARTIAL.

This authority is conferred by the 72d and 73d Articles of war, and Seç. 1326, Rev. Sts.

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1. See DIGEST, 242–3. In the regulations referred to in a previous note it is directed that the application shall set forth, under oath, "facts showing the error or injustice complained of."
2. XII Opins., 4.
3. See Digest, 242, note.

2. Under the 72d Article. This Article, as has been seen, provides that—"*Any general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department, may appoint*[1] *general courts-martial whenever necessary.*"

"General officer commanding an army." The corresponding term of description employed in the Article of 1874, of which the above is a recent amendment, was—"Any general officer commanding the Army of the United States, a separate army, or," &c. Upon comparing the two forms, it is quite evident that the designation "an army" was employed as a single and comprehensive term intended to include both the Army as a whole and any lesser or separate "army"—in other words the two sorts of armies indicated in the original 72d Article. Under the present provision, therefore, a general court-martial may be ordered by the general officer assigned by the President to command the Army of the United States,[2] as well as by any general commanding a body of forces organized and designated by the President for special military purposes as an "army." Such would properly be a body distinct and complete within itself, and not existing as an integral portion of some larger component part of the Army, but acting independently under its own commander, subject only to the direction of the Commander-in-chief, or the General-in-chief of the Army. Such an "army" would scarcely be constituted except in time of war; and of the species of army contemplated the Army of the Potomac, Army of the Tennessee, Army of Virginia, &c., as organized in the late war, were instances.

"A territorial division or a department"—"a separate department." The terms "division" and "department," as here employed, refer to the geographical or territorial commands, fixed and designated in General Orders, into which the public domain is commonly divided for military purposes.[3] Such are

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1. The proper significance of the term "appoint," as meaning the same as *order* or *convene*, has been referred to in a previous note.

2. Under a similar term in the corresponding article, (the 65th,) of 1806, the different generals commanding the Army, as Gens. Dearborn, Brown, Macomb and Scott, convened, from time to time, general courts-martial.

3. As to the meaning of the term "department," see Parker *v.* U. S., 1 Peters, 293; also II Opins. At. Gen., 355, where it is held that the word

at present, (1886,) the Divisions of the Missouri, of the Atlantic and of the Pacific; and the Departments of the East, the Missouri, Texas, Dakota, the Platte, California, the Columbia and Arizona. The term "Division" is thus distinguished from the same word as employed in a purely military sense in the next Article, and the term Department from the same name as attached to the corps of the General Staff.[1] A general commanding both a Division and a Department, (as do the Commanders of the Divisions of the Atlantic and the Pacific,) is empowered to order a general court-martial in either of his capacities. A colonel commanding a department would not be empowered to order such a court as Division Commander even if temporarily assigned to the command of the Division.[2]

Delegation of the authority. As the Article expressly designates certain particular commanders as competent to order general courts for armies, divisions and departments, it follows, upon the principle of *expressio unius exclusio alterius*, that no other commanders or officers shall be so authorized. A commander of a division, department or army cannot therefore delegate to an inferior commander or to a staff officer the authority vested in himself by this Article, or authorize such officer to exercise the same, *for him*, in his temporary absence or otherwise.[3]

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as used alone, (*i. e.* without the word "territorial" or like description,) in the 65th Article of 1806, meant geographical department. Note the reference to "Military Geographical Divisions and Departments" in par. 128 Army Regs.

1. That "department," as employed in the corresponding article of 1806, included a staff department, or at least the "Engineer Department," was claimed at an early period by the Chief of Engineers. See Order, Hdqrs. Engr. Dept., Washington, July 23, 1818, promulgating proceedings in cases of Pvt. B. Moss and others, Company of Bombardiers, Sappers and Miners, tried by a general court-martial convened by the Chief of Engineers at West Point, with remarks of Brig. Gen. J. G. Swift, C. E. This view was not tenable after the ruling of the Supreme Court in Parker *v.* U. S., *ant.*

2. A *brevet* general, assigned (under Sec. 1211, Rev. Sts., as amended by the Act of March 3, 1883,) to command a Division or Department according to his brevet rank, would be invested with the command and powers of a full general under this Article, and otherwise. See Opin. At. Gen., of Feb. 23, 1881.

3. Digest, 54. As to the effect of the absence of the commander from his command, see *post*.

The practice was at one time very general in our Army for department or army commanders, in detailing general courts, to authorize or

Scope of the authority. It is of course to be understood that the authority, conferred by the article upon division, department and army commanders as such, extends only to the convening of courts for the trial of officers and men of their own commands.[1]

Suspension of the authority by absence, &c. It further follows from the terms of the Article that the general officer must be in the exercise of his command when the court is ordered, to make the order a legal one. While the mere fact alone[2] that, when issuing the order, he was absent from his command, would not, provided the absence were accidental,—as where, in pursuing hostile Indians, he had temporarily passed the boundaries of his department,—properly be deemed to affect the legality of the order, the result would be otherwise where the absence were such as, by military law or usage, to *detach* him from his command. Thus, where a division or department commander is absent for any considerable period from his command by reason of having received and taken advantage of a leave of absence,[3] or of having been placed by superior authority upon some distinct and separate military duty,—as the duty of sitting as a member of a court or

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instruct the commander of the post at which the court was to be held, to fill up such vacancies as might occur in the detail, through absence, &c., with officers of his command selected by himself. See, for example, G. O. as late as of Aug. 24 and Sept. 23, 1841. In some cases the president only, or two or three members, were named by the superior, and the inferior was directed to add the rest. See G. O. 14 of 1832; Do. 33 of 1838; also Do. (without number,) of April 11, 1838. In a few cases the order for the court designated a certain post commander as president, and directed him to detail the other members from his command. See, for example, G. O. 60, of 1835. It need hardly be said that all such orders were in contravention of law, and upon the revision by the Secretary of War of Capt. Trenor's case, (G. O. 71 of Nov. 18, 1841,) in which the practice was condemned, the same was finally discontinued.

1. DIGEST, 53.

2. Compare XVI Opins. At. Gen., 678.

3. The principle that the effect of the status of being on leave of absence is to detach the officer from the command or duty held or exercised at the time of entering upon the leave, is illustrated in I Opins. At. Gen. 181; VII Id. 161; XIII Id. 526, 527; U. S. *v.* Williamson, 23 Wallace, 415. And see the definition of soldiers "in the line of duty," as excluding those "at the time on furlough or leave of absence," in J. R. of April 12, 1866. In XIII Opins. 527, the Atty. Gen. says:—to have "no post or duty * * * is the case, for the time being, of an officer on leave."

board at a distance from his department,—his authority under the 72d Article will, during the period of such absence, strictly and properly be regarded as *suspended*, even if no other officer be assigned to command in his place.[1]

In such cases indeed the same power that has originally assigned the officer to his command, the President, may *specially order* that, during his absence or detaching duty, he shall continue to exercise his division or department command as if he were present; and under such an order he would continue to be authorized to convene general courts therefor: without some such order, however, the use of such authority might give rise to a serious legal question, and the same could not therefore safely be exercised.

Discretion, in general, of commander under the Article. Under the conditions indicated, and subject to the general law of the service, the power vested in the commander by the Article is *complete* and *exclusive*. The President indeed, as Commander-in-chief, may direct him to order a court in a particular case; and the exercise of his authority must of course be governed by the statute of limitations, (Art. 103.) But, in general, it is entirely within his discretion to determine, in each instance, whether a court shall be ordered at all,[2] or, if ordered, when and where, (within the command,) it shall be convened. As to *place*, the commander, being informed of the stations and status of the officers of his command available for court-martial duty, (and having in view the provision of the 76th Article,) will readily select the locality at which any particular court may be assembled with the most convenience to the service and the least expense to the United States.

2. Under the 73d Article. This Article is as follows:—"*In time of war the commander of a division, or of a separate brigade of troops, shall be competent to appoint a general court-*

1. DIGEST, 54; G. C. M. O. 26 of 1878; Do. 9, Dept. of Columbia, 1880. The "decision of the Executive" referred to in the former of these Orders was a ruling, (in concurrence with an opinion of the Judge Advocate General,) that a department commander, who had duly convened a certain general court-martial, was not authorized to take action upon and approve its proceedings and sentence, when absent from his command and the department, on a leave of absence.

2. DIGEST, 53.

martial. But when such commander is the accuser or prosecutor of any person under his command, the court shall be appointed by the next higher commander."

Operation of the Article. This statute, of which the original form was contained in the Act, passed early in the late war, of Dec. 24, 1861, made its first appearance as an Article of war in the revised code of 1874.[1] As a provision for time of war only, it was viewed as ceasing to be operative on Aug. 20th, 1866, the date assigned as that of the conclusion of the *status belli*;[2] and in several cases the proceedings of courts convened under it in 1866, subsequently to that date, were declared void in Orders.[3]

Division and brigade commands. In our law a brigade properly consists of at least two regiments of infantry or cavalry, and a division of at least two brigades; and the "commander" indicated in the Article will regularly be, of the former a brigadier general, and of the latter a major general.[4] It is not however essential that he should be such, or even a general officer. A colonel or officer of less rank may, in war, become, for the time, by virtue of seniority, the commander of a brigade or a division, and as such empowered to exercise the authority devolved by this Article. Except indeed in war, divisions and brigades are not formed in our army.[5]

Meaning of "separate brigade." By this term is evidently meant a brigade which is not a component part of any division, but is operating by itself, and of which the commander reports directly to the commander of the corps, army, or department, or to the General commanding the Army or the Commander-in-chief.[6] After the passage of the Act of 1861, the original of Art. 73, it was found that officers sometimes assumed to convene general courts as commanders of "separate" brigades, when their

1. Other provisions of this Act are incorporated in Arts. 105, 107 and 112.

2. The Protector, 12 Wallace, 702.

3. G. O. 68, Dept. of Washington, 1866; Do. 7, Dept. of the Potomac, 1866; Do. 24, Dept. of the Mo., 1866.

4. Sec. 1114, Rev. Sts. See *ante* as to the difference between the term "division" as here used and as used in the preceding Article.

5. Par. 128, Army Regs.

6. DIGEST, 56.

commands were not separate in the evident sense of the Art
[illegible] were embraced in division commands,[1] or were smal
[illegible] commands not properly amounting to or constitu
brigades.[2] The latter was peculiarly the case with the
[illegible] known as "districts." With a view of defining the
[illegible] there was issued from the War Department in August,
a General Order, which, under the heading of "Courts-Ma
for Separate Brigades," prescribed as follows:—"*Where a p
district command is composed of mixed troops equivalent to a
gade, the commanding officer of the Department or Army
designate it in orders as "a separate brigade," and a copy of
order will accompany the proceedings of any General Court-
tial convened by such brigade commander. Without such auth
commanders of posts and districts having no brigade organiz
will not convene General Courts-Martial.*"

The rulings of the Judge Advocate General in construing
Order are set forth in the Digest of Opinions.[3]

The Article under consideration concludes with the prov
that, when a commander, authorized by the article to or
general court, "is the accuser or prosecutor of any person u
his command, the court shall be appointed by the next hi
commander." What has been said under the previous Artic
to the purport of the terms "accuser" and "prosecutor" wi
substance be applicable here. The "next higher command
in our military organization in time of war, will ordinarily b
commander of the army corps, separate army, or departmer
which the "division" or "separate brigade" is included.

3. Under Sec. 1326, Rev. Sts. This statute declares th
"*The Superintendent of the Military Academy shall have p
to convene general courts-martial for the trial of cadets, an*

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1. In G. O. 299 of 1863, the proceedings were set aside and
sentence held inoperative in a case tried by a general court conv
by the commanding officer of the "2d Brigade, 3d Division, 14th
Corps," *i. e.* of a brigade which was a component of a division ar
not "*separate*." And see G. O. 246 of the same year; also DIGES

2. See case in G. O. 14, Dept. of the Platte, 1866.

3. Pages 57-58. See also G. C. M. O. 43, of 1865, where it
held that the officer commanding the "Kanawha Valley For
was not authorized to order a general court; also G. O. 48, Nor
Dept., 1865, where it was similarly held of the commander of a
Rendezvous.

execute the sentences of such courts, except the sentences of suspension and dismission, subject to the same limitations and conditions now existing as to other general courts-martial."

This is an enactment of March 3, 1873, and is properly an article of war. The "Superintendent" indicated is an officer invested, by Sec. 1311, Rev. Sts., with the "immediate government and military command" of the Academy and of the military post of West Point. The above provision is sufficiently clearly expressed,[1] and no serious question as to its construction is known to have been raised. The "limitations and conditions" which it refers to are the following, viz:—(1) that sentences of dismissal or suspension, imposed upon cadets by courts-martial convened by the superintendent, can become operative only through the order of the President given for their execution, upon the formal confirmation by him of the same, after the approval thereof by the Superintendent; (2) that where the Superintendent is the "accuser" or "prosecutor" of a cadet whose trial is contemplated, recourse must be had to the President for the ordering of the court.

1. It would have been more complete had the words *approve the proceedings and* been inserted before the word "execute." That the Superintendent shall approve before executing is however of course to be understood.

CHAPTER VII.

THE COMPOSITION OF GENERAL COURTS-MARTIAL.

This subject is regulated by the 75th, 77th, 78th and 79th Articles of War, and Sec. 1658, Rev. Sts. It will be considered under the heads of—I. Class and Rank of Members; II. Number of Members.

I. CLASS AND RANK OF MEMBERS.

They must be Commissioned Officers—*Art. 75.* This Article provides that—"*General courts-martial may consist of * * * officers;*" i. e. that officers alone shall be competent to sit on such courts. Sec. 1342, Rev. Sts., by which the code of Articles is prefaced, declares that "the word officer as used therein shall be understood to designate *commissioned* officers." Commissioned officers only therefore may compose general courts.[1] The detailing of non-commissioned officers or soldiers, where the accused is one of these grades, with commissioned officers, on courts-martial, which is required by some of the European codes,[2] has never been authorized by our law.

General Rule of Eligibility. The term "officers" not being limited or qualified by the Article, (Art. 75,) it follows that *all* commissioned officers of the army, of whatever rank, and whether or not having *command*, are, (except where specifically excluded by express enactment,) eligible to be detailed as members of general courts. Officers on the retired list are so excluded by Sec. 1259, Rev. Sts.; but they are the only class thus excepted. All

1. The law is the same as to inferior courts. See Arts. 80–82.

2. See the author's Translation of the German Military Code, p. 16—note, and authorities cited. The French Code de Justice Militaire, § 10, directs that one *sous-officier*, (non-commissioned officer,) shall sit on courts for the trial of non-commissioned officers and soldiers.

ther commissioned officers, *i. e.* all officers on the active list,[1] whether of the line or staff, may legally sit as members;[2] and lthough staff officers are detailed as such less frequently than ne officers, there is, in our present limited army, no department r branch of the staff which is not more or less frequently repre-nted on courts-martial, except only chaplains.[3]

Who are Commissioned Officers. These are officers who ave duly received and accepted commissions appointing them, r rather evidencing their appointment,) to *offices* in the army. commission may be permanent or temporary; that is to say it ay evidence an appointment made by the President and con-med by the Senate, or merely an appointment of the class thorized, by Art. II, Sec. 2 § 3, of the Constitution, to be con-rred by the President during a recess of the Senate, to "expire at e end of their next session," and also called "commissions" in e Constitution. Thus an officer holding a commission of the tter description, is, while it remains in force, as eligible to be signed to duty on a court-martial as is any officer who has re-ived the more formal and permanent commission issued upon e confirmation of his appointment by the Senate. So, the nure, as to duration, of the office conferred by the commission nnot affect the eligibility of the officer for court-martial service. hus a commissioned officer of volunteers, though the tenure of is office may be limited to a comparatively brief period, is no ss eligible for such service.[4]

The appointment of a Cadet is not a commission in the military nse. He is therefore not a commissioned officer, and not eli-ible to act as a member of any court-martial.[5]

"Acting" Officers. It need hardly be added that persons "*act-*

1. That is to say, all active officers having *military rank.* See *post.*

2. Subject of course to objection under Art. 88. It may be remarked at officers known or believed to be liable to challenge will not properly detailed upon courts-martial.

3. Chaplains, being commissioned officers with the rank of captain, as *legally eligible* for court-martial duty as any other officers of the my. Their detail however has been expressly disapproved by the cretary of War. Circ., Dept. of Cal., June 8, 1875.

4. See X Opins. At. Gen., 522–3.

5. I Opins. At. Gen., 469; II Id., 251; VII Id., 323; Babbitt *v.* U. S., Ct. Cl., 203.

ing," (by the authority of military orders,) as officers, or for an in the stead of officers, but who are not legally appointed or com missioned as such, are, though effectively performing all the dutie which would devolve upon officers of the army under similar ci cumstances, clearly not officers within the meaning of the preser Article, or qualified to sit upon courts-martial. Thus an "actin assistant," or "contract" surgeon, not being an officer of th army but a civil official, is not so qualified,[1] and would not be s even though serving with an army in the field and thus subje to military law. Nor, for a similar reason, would a civilia acting as a volunteer aid on the staff of a general in the field, c a non-commissioned officer acting as a commissioned officer, b thus eligible.

"Officers" implies Rank—*Professors*. It is clearly co templated by the laws and regulations governing the service th members of courts-martial shall have relative military rank Thus Art. 79 provides that an officer shall not in general be trie by officers inferior to him in rank; so the Army Regulations pars. 878, 879, 881, direct as to the order of the naming of th members in the detail and their precedence on the court and a to the selection by seniority of the president. The term "officers," as employed in Art. 75, must therefore be deemed t imply *rank;* and as all commissioned officers, with a single ex ception, of the present military establishment have militar rank, it follows that the excepted officers referred to cannot legally be ordered to sit on courts-martial. These are the professors of the Military Academy, who, though made by Sec. 1094, Rev. Sts., a part of the army, and appointed by the President and confirmed by the Senate as public officers,[2] yet have no military rank. That they were not eligible to detail upon courts-martial, because having no rank "lineal or assimilated," was held by Attorney General Wirt in 1821,[3] and, in the respect of rank, their status has not since been changed.

Relative Rank of Members—*Art. 79*. This Article, with a view to the excluding, as far as reasonably practicable, from courts-martial, officers who as junior to the accused may have a

1. DIGEST, 59.
2. That they are commissioned officers is noticed in a recent opinio of the Atty. Gen. of May 12, 1882.
3. Opins. At. Gen., 469.

interest in procuring him to be dismissed, suspended, &c., provides that—"*No officer shall, when it can be avoided, be tried by officers inferior to him in rank.*" This provision, (like that of the 75th article in reference to the *number* of the court, presently to be considered,) is regarded as not prohibitory but directory only upon the convening commander. Its effect is understood to be to leave to the discretion of that officer, as the conclusive authority and judge, the determining of the question of the rank of the members, with only the general instruction that superiors or equals in rank to the accused shall be selected, so far as the exigencies and interests of the service may permit. Such was, early in the recent war, the construction given to the provision by Judge Advocate General Holt,[1] and this construction, adopted by other authorities,[2] has been sustained by the long-continued practice of the service. Thus, that an officer is inferior in rank or grade to the accused does not render him incompetent to sit as a member of the court-martial,[3] or subject him as such member to challenge.[4]

In practice, in our service, courts for the trial of general officers have almost invariably, if not necessarily, comprised members junior to the accused; in time of *peace* indeed, it would rarely be practicable to assemble even a *minimum* court of equals or superiors in rank for the trial of a general officer of one of the higher grades.[5] Upon courts for the trial of officers of the lower

1. DIGEST, 60.

2. See Trial of Capt. D. Porter of the navy, (1825,) p. 20; G. C. M. O. 7, Dept. of the Platte, 1880; Wooley *v.* U. S., 20 Law Rep. 631.

That the phrase, "*when it can be avoided,*" in Art. 79, has practically the same meaning as the clause of Art. 75, that general courts "*shall not consist of less than 13 when that number can be convened without manifest injury to the service,*" is illustrated by the provision in the *naval article*, (No. 39,) corresponding to that of Art. 79, viz:—"*where it can be avoided without injury to the service*"; this expression combining in effect the two forms employed in the articles of war.

3. This point is noticed in a recent opinion of the Atty. Gen. of June 28, 1882.

4. See Trial of Capt. Porter above cited; also, generally, under EIGHTY-EIGHTH ARTICLE in Chapter XIV.

5. On some of the principal trials of general officers in our army, the rank of the members of the court was as follows: Maj. Gen. Chas. Lee, (1778,)—1 maj. gen., 4 brig. gens., 8 cols.; Maj. Gen. Arnold, (1779,)—1 maj. gen., 3 brig. gens., 9 cols.; Brig. Gen. Hull, (1813,)—1 maj. gen., 1 brig. gen., 4 cols., 7 lieut. cols.; Maj. Gen. Wilkinson, (1814,)—2 maj. gens., 3 brig. gens., 7 cols., 1 lieut. col.; Maj. Gen. Gaines,

degrees the direction of the Article has been more nearly observed. There have indeed been frequent departures from the rule, prompted doubtless in general by a due consideration for the convenience and economy of the service. Such exceptions, however, *if reasonably avoidable*, are in contravention of the letter of the law, and should not be too freely sanctioned.

Competency of Certain Classes of Officers in Certain Cases—*Regulars, as distinguished from volunteers, militia, &c.—Art. 77.* This article declares that—"*Officers of the regular army shall not be competent to sit on courts-martial to try the officers and soldiers of other forces, except as provided in Art. 78,*"—next to be considered. By "regular army" is to be understood the permanent military establishment, as especially distinguished from *volunteers*, or *militia* in the federal service. These two contingents—volunteers and militia—are indeed quite distinct from each other; the former, as will be further illustrated in the next Chapter, being, for the time, equally with the regulars, a part of the Army of the United States, while the latter, though in the employment of the nation, are State troops.[1] But in view of the comprehensive and general term, "officers and soldiers of *other forces*," the Article has been construed as disqualifying regular officers from acting as members of courts-martial for the trial of any officers or soldiers not of the regular army, whether volunteers, militia, drafted men, or any other persons except the class of *marines* designated in the next article.

(1816,)—1 maj. gen., 3 brig. gens., 3 cols., 6 lieut. cols.; Bvt. Maj. Gen. Twiggs, (1858,)—3 bvt. maj. gens., 2 bvt. brig. gens., 5 cols., 2 bvt. cols., 5 lieut. cols.; Maj. Gen. Porter, (1862,)—2 maj. gens. 7 brig. gens.; Brig. Gen. Hammond, (1864,)—1 maj. gen., 8 brig. gens.; Brig. Gen. Swaim, (1884,)—1 maj. gen., 5 brig. gens., 7 cols.; Brig. Gen. Hazen, (1885,)—2 maj. gens., 8 brig. gens. 3 cols.

The court for the trial of Marshal Bazaine, (1873,) consisted of ten generals, no marshals being at the time available. That by which the "Emperor" Maximilian and his generals Miramon and Mejia were tried and sentenced to death, at Queretaro, Mexico, June 13–14, 1867, was composed of one lieut. col. (president,) and six captains.

1. In some cases during the late war volunteers were confounded with militia and it was held that, under the then existing Art. 97, a regular officer could not legally be detailed on a court for the trial of volunteers. G. O. 53, Dept. of the East, 1864; Do. 16 Dept. of the Mo., 1864; G. C. M. O. 11, 13, 16, Dept. of Ky., 1865. While this construction is believed to have been incorrect, it can scarcely be questioned that the present Art. 77—a much clearer and more precise provision—is to be interpreted as indicated in the text.

Thus a court composed entirely of regular officers cannot egally be ordered for the trial of an officer or soldier of another military force; nor, where such a court has been once duly created for the trial of a regular or regulars, is it qualified to proceed to the trial of a volunteer, &c., if brought before it for trial. And where the court is not entirely but only partially so composed, even if it comprises five officers of another force eligible for the particular trial, it cannot properly proceed to such trial. Should it do so, its proceedings would not indeed necessarily be void, but, inasmuch as, in the event of a conviction and sentence, the proportion of the members who concurred in the judgment would not be known, the only safe course for the reviewing authority would be to disapprove the proceedings.

Volunteers, &c., as eligible for trial of regulars. It may be noted that while regular officers are thus precluded by Art. 77 from trying offenders belonging to the other branches of the public military force, our code contains no converse provision that regulars shall not be tried by courts composed of officers of the other contingents—militia or volunteers—of a mixed national army. In the absence of any such provision during the late war, officers of volunteers were not unfrequently detailed as members of courts-martial for the trial of regular officers and soldiers; their competency to take part in such trials having been at an early date affirmed by the Judge Advocate General. Officers of militia called forth and engaged in the public service would have been equally competent. And—the law remaining unchanged—militia and volunteer officers will of course be similarly competent, when serving with regulars in the future; as will also militia officers be competent to sit upon trials of volunteers.[1]

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1. In this connection may be noticed a ruling properly made during ıe late war—that an aid-de-camp to a Governor of a State was not *as ıch* eligible to be detailed on a court-martial for the trial of U. S. volıteers. G. O. 30, Dept. of the Mo., 1864.

It is of course not competent for a military commander to *order* that ırts for the trial of a certain class of volunteer, &c., troops shall be ımposed in whole or in part of particular volunteer, &c., officers. hus the order—G. O. 46, Dept. of Va. & No. Ca., 1863—that a maıity of the members of courts for the trial of *colored troops* should, hen the same could be detailed without manifest injury to the service,) officers in command of such troops, was properly revoked by the bsequent G. O. 29, Dept. of Va., 1865.

Regulars and Marines associated—*Art. 78.* This article provides that:—"*Officers of the marine corps, detached for service with the army by order of the President, may be associated with officers of the regular army on courts-martial for the trial of offenders belonging to the regular army, or to forces of the marine corps so detached.*" The nature and capacity of that amphibious branch of the public service known as the Marines, as a kind of connecting link between the army and the navy, is illustrated in this Article. This corps, under the earlier legislation in regard to it,[1] had occupied an undefined position.[2] The Act of June 30, 1834, however, while assimilating it to the army in respect to organization, discipline and pay, permanently attached it to the naval establishment for administrative and jurisdictional purposes,[3] and it is now classed as a part of the navy in the Revised Statutes. The Act of 1834 contained a provision, now re-enacted in Sec. 1621, Rev. Sts.,—"*That the said corps shall at all times be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy, except when detached for service with the army by order of the President.*"

The latter part of this provision, incorporated with the substance of Article 68 of the code of 1806, forms the present 78th Article.

The principal situations in which marines would be likely to co-operate or be associated with the army on duty, are indicated in the provision of the Act of 1798, embodied in Sec. 1619, Rev. Sts., as follows—"*The marine corps shall be liable to do duty in the forts and garrisons of the United States, on the sea-coast, or any other duty on shore, as the President at his discretion may direct.*" Marines were detached for service with the army for considerable periods in the war with Mexico;[4] and similarly on

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1. Res. of Nov. 10, 1775; Acts of March 27, 1794, July 1, 1797, April 27, 1798, July 11, 1798, and Dec. 15, 1814.

2. Atty. Gen. Berrien describes the corps, (in 1830,) as—"in many respects anomalous, attached both to the army proper and to the naval armament of the United States, and yet incorporated with neither but rather *sui generis*" II Opins. 357. And see Id. 239-241, 353; III Id. 117, where it was regarded as rather belonging to the army; and, *contra*, I Id. 381; II Id. 78; V Id. 705; Com. *v.* Gamble, 11 S. & R. 93; Wilkes *v.* Dinsman, 7 Howard, 125, where it was viewed as an adjunct of the navy—under the legislation prior to 1834.

3. See X Opins. At. Gen., 118, 129, 487; Wilkes *v.* Dinsman, 7 Howard, 125, 126; In re Baily, 2 Sawyer, 200.

4. See the references to the services of this corps in the Mexican war,

several occasions during the recent war, of which the taking of Fort Fisher was the most marked.[1]

In the early case of Lieut. Col. Wharton of the marine corps,[2] it was held by Atty. Gen. Rush that, under the terms of Art. 68 of 1806, it was *discretionary* with the government whether to detail *any* marine officers on a court-martial for the trial of a marine serving in connection with the army;—that the court might legally be composed of army officers only; and this conclusion was approved by the President. It was deemed expedient, however, to detail two marine officers on the court in that case; and such course, since adopted in practice, is especially fitting in view of the changed relations of the army and marine corps under the subsequent legislation.

In what proportions the two different classes of officers will properly be associated on courts-martial is not indicated by the Article; this matter being evidently left to be regulated by the convening authority in view of the comparative numbers of the officers of the two corps available for the duty, the particular corps—whether army or marines—of the offender or majority of offenders to be tried, &c.[3]

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in V Opins. At. Gen., 59, 155; also the recognition of their service by Congress in the J. R. of Aug. 10, 1848, and in the vote of thanks, tendered in the J. R. of Aug. 7, 1848, "to the officers, sailors, and marines of the navy," especially for "their efficient co-operation with the army in the capture of Vera Cruz and the castle of San Juan de Ulloa." See, further, as illustrating the subject, the printed Trial of 1st Lieut. J. S. Devlin, Marine Corps, Washington, 1852.

1. See official reports of Gen. Terry and Rear Admiral Porter, and votes of thanks to them and their commands in the J. R. of Jan. 24, 1865.

2. G. O. of Sept. 19, 1817.

3. Marine, and other, officers were detailed together as follows, in the following Orders:—In G. O., Third Mil. Dept., of Oct. 20, 1813, 1 marine officer with 4 regular and 2 volunteer officers: In G. O., Hdqrs., N. Orleans, of Dec. 25, 1813, 2 marine with 7 other officers: In Dept. O., Second Mil. Dept., Nov. 15, 1817, 1 marine officer with 5 other officers: In Lt. Col. Wharton's case, (*ante*,) 2 marine with 3 regular officers: In Orders, Second Mil. Dept., Nov. 24, 1818, 3 marine with 2 regular officers: In G. O. 6, A. G. O., 1830, 2 marine with 5 regular officers, for the trial of a captain of marines: In O., No. 47, Army of the South, 1836, 2 marine with 5 regular officers: In G. O. 10, Hdqrs. Army, Mexico, 1848, 1 marine officer with 8 regular officers, in a court by which were tried 24 soldiers of the army and 1 enlisted marine.

Hough, (P. 683,) cites a case of an officer of marines, in which, "*at the prisoner's request*, his court-martial," (ordered under an article similar to that of our code,) "was composed of one-half officers of his own corps and the other half of officers of the line."

Militia—*Authority for their government, &c.* The Constitution, Art. I, Sec. 8 § 15, 16, empowers Congress—"To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;" and further—"To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States; reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." It also, (Art. II, Sec. 2 § 1,) makes the President the Commander-in-chief of the militia when in the service of the United States.

By virtue of these grants, Congress, in a series of statutes, particularly in those of May 2, 1792, Feb. 28, 1795, April 18, 1814, May 13, 1846, July 29, 1861, and July 17, 1862, s. 1, has authorized the President, in certain contingencies,[1] to call forth the militia, and has provided for their government; and, in a further series, (particularly in those of May 8, 1792, Jan. 2, 1795, May 2, 1803, April 23, 1808, May 12, 1820, March 19, 1836, and July 17, 1862, s. 2,) has provided more especially for their organization, arming, pay, and internal discipline.

Of the former series, the Act of 1792 was repealed and superseded by that of 1795, which was indeed with some slight modifications a repetition of the first. The Acts of 1814 and 1846 were resorted to for the special occasions of the late war with Great Britain and the war with Mexico respectively, and presently expired by their own limitation.[2] To the date of the Revised Statutes the Act of 1795 remained the principal law on the subject of the mobilization and government of the militia, though in some of its details superseded or materially amended by the Acts above specified of 1861 and 1862.[3] These Acts were indeed adaptations of the legislation of 1795 to the circumstances of the recent war.

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1. That the President is the sole judge to determine whether one of the exigencies contemplated by the Constitution has arisen, and that his decision on the point is conclusive upon all other persons, was held in Martin *v.* Mott, 12 Wheaton, 19. And see Luther *v.* Borden, 7 Howard, 11; Vanderheyden *v.* Young, 11 Johns. 150; People *v.* Campbell, 40 N. Y. 135; Kneedler *v.* Lane, 45 Pa. St. 238.

2. See Mills *v.* Martin, 19 Johns. 21, 23.

3. By the Act of 1862, the President was, for the first time, authorized to resort to conscription for compelling the service of the militia. See McCall's Case, 5 Philad. 259.

Such of their provisions as were of a general character, together with those remaining from the Act of 1795 and other early legislation, comprise, (in combination with the operative enactments of the second series above indicated,) the existing law relating to the militia, and are all incorporated in a separate Title—No. XVI—of the Revised Statutes.

The first section of this Title defines the militia as including, generally,[1] "every able-bodied male citizen of the respective States, resident therein, who is of the age of eighteen years, and under the age of forty-five years;" and Atty. Gen. Legaré has well described this class as "the body of the people, armed and disciplined in self defense."[2] When and how the militia are brought within the *jurisdiction* of courts-martial, and what is the extent of that jurisdiction, will be considered in the next Chapter.

Composition of militia courts. As to the composition of such courts,—Sec. 1658, Rev. Sts., (a re-enactment, in the same words, of s. 6 of the Act of 1795,[3]) provides: "Courts-martial for the trial of militia shall be composed of militia officers only."

The "courts-martial" here indicated are courts-martial of the United States, convened under the Articles of war, and the militia referred to are the militia when called into the active service of the United States under the Constitution and the laws above mentioned. The "militia officers" are the officers elected or appointed for such militia under the laws of the States from which they are called.

In composing, however, courts-martial for the trial of militia, the members are to be selected from the entire body of militia officers in the service of the United States, without any reference to the different States from which they may have been called. Militia once called into the service, from whatever State, may be placed by the President under the command of *any* officer,[4] and may be required to serve in any part of the United States;[5] and it was specifically held in Mills *v.* Martin[6] that a court for the

1. With certain exemptions specified in Sec. 1629.
2. II Opins. At. Gen., 691.
3. This provision was also contained in the code of articles of 1806, (in Art. 97,) but was omitted from that of 1874.
4. Cooley, note to 2 Story, Com. 121.
5. Highsmith *v.* Ussery, 25 Texas, 108.
6. 19 Johns. 7.

trial of a militiaman need not be composed of officers of th militia of the State of the accused, but might legally be mad up of officers of the militia of *any* State or States. In the articl of war of 1776, in which the statute under consideration firs appeared in our law, it was provided that militia courts shoul "be composed entirely of militia officers of the same provincia corps with the offender." This restriction was omitted in th corresponding article of 1806, the original provision having bee meanwhile superseded by the present form as initiated in th Act of 1795.[1]

II. NUMBER OF MEMBERS,

The Law on the Subject. This is contained in Art. 75, a follows:—"*General courts-martial may consist of any number o members from five to thirteen; but they shall not consist of les than thirteen when that number can be convened without manifes injury to the service.*"

Five Members a Quorum. It is clear from the first par of this provision that, while a court of less than five or more tha thirteen[2] members will not be a legal body,[3] a court of five wil always be a full and complete tribunal for the purpose of tria and judgment, and that the addition of further members will no augment or in any manner affect its jurisdiction or authority. A less number indeed than five may meet and adjourn, and wher there are but five members present at the outset and one i objected to, (under Art. 88,) the other four may deliberate an

1. The present enactment is, as has already been noticed, properl an article of war, and might well have been embraced in the present, a it was in the preceding, code.

2. The first Mutiny Act prescribed that no court authorized thereb should "consist of fewer than thirteene." Clode, (M. L., 120,) ob serves:—"It may reasonably be presumed that the controlling analog which suggested this tribunal, (composed of a president and twelve offi cers,) was the civil administration of justice by a presiding judge an twelve jurymen." In the present British law, "a general court-marti shall consist in the United Kingdom, India, Malta and Gibraltar, o not less than nine, and elsewhere of not less than five officers." Arm Act, § [illegible]

3. [illegible] members were usually detailed on our earlier importan general courts-martial—those for instance for the trials of Gens. Hul W[illegible] and Cushing in 1811–1818. So, for th trials of Capt. [illegible] in 1847, and Gen. Twigg in 1858. [illegible] commonly been nine- [illegible] in the cases of Gens. [illegible] and Hammond, in the rece

determine upon the challenge.[1] But five members at least must be sworn and constitute the court for the trial, and five must continue present and acting throughout the entire proceedings till the final record is completed and authenticated.

If the court begins with more than five members, the loss or absence of one or more does not affect its capacity provided at least five remain, and this rule applies through the entire life of the body.[2] Thus five are sufficient to be re-assembled and to revise the sentence, though when it was originally adjudged, the court may have consisted of ten or thirteen members; and the sentence, as revised and finally adopted by the five, will be the sentence of the court.[3]

On the other hand, if a court, beginning with five or more, loses, by the operation of challenge, or by death, sickness, or other casualty, a member or members, so that it is reduced to four or less, its action must be at once suspended, since it has ceased, for the time at least, to be a court, and the objection to its proceeding is one which cannot be waived.[4]

The number—within the limitations of the Article—to be detailed upon a general court for the trial of any case or cases, will be determined by the convening commander in his discretion and with a view especially to such circumstances as the rank of the accused, the importance of the case, the character of the offence, the supply of available officers, and the exigencies of the service.[5]

Authority to add Members. A General court, though reduced below five, is not necessarily to be dissolved, nor can it

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war. In the cases of Gens. Swaim and Hazen, however, the number detailed was thirteen. In the British service, before courts of less than thirteen were authorized for the trial of officers, the number of members often exceeded that number. For example, the number detailed for the trial of Lord George Sackville, in 1760, was sixteen; for the trials of Lt. Gen. Murray and Col. Debbieg, in 1783 and 1784, eighteen; for the trial of Lt. Gen. Mordaunt, in 1757, twenty-one; and for the trials of Capt. Burrish, Lieut. Page, and others, tried by a naval court in 1745, twenty-five.

1. DIGEST, 59.

2. A form, now unknown, prevailed to some extent in our army, apparently till about 1841, of detailing 13 or 11 members, with directions to proceed if not reduced below 9 or 7, See G. O. 44 of 1832; 3 of 1837; 25 of 1839; 65 of 1841.

3. DIGEST, 441. And see VII Opins. At. Gen., 338.

4. DIGEST, 59.

5. Coppée, 55.

assume to dissolve itself or declare itself dissolved. Such (solving is a function of the convening commander, who is a empowered, in his discretion, to continue the court by addin member, or the requisite number of members to bring it up five, and when thus renewed, its power as a court is restored, a it may legally proceed with the trial.[1] The adding, however new members to courts-martial, *after a trial has been ente upon*, has been of rare occurrence in our practice. Such actio not indeed illegal;[2] the added member, provided the evide taken, or material proceedings had, prior to his appearance, first read to him from the record, and he be duly sworn, (a the accused has been afforded an opportunity to challenge hi may legally act upon the court during the remainder of the t and take part in the judgment; and the sentence, if any, impo by the court will be entirely legal and operative. But this act must be in general of doubtful policy, and is not to be reso to unless the demands of justice and interests of the serv clearly require it. Where, for example, by the death, disabili enforced absence, &c., of a member or members, a court is duced below five, in the midst of an important trial, so that not renewed, its previous proceedings, however extended, will for nothing, and the trial will have to be recommenced by a n court, to the delay of justice; inconvenience of the service, de ment of discipline, and perhaps greatly increased public pense,—in such a case the authorized commander will be fu justified in continuing the court by the detail of the requi number of members.

Effect of Second Clause of Article—"*Manifest injur* The Article, as has been seen, declares that a general court "*s not consist of less than thirteen when that number can be conve without manifest injury to the service.*" In a case of a dese sentenced to be shot by a court of five members, it was held an early period, (1810,) by Atty. Gen. Wirt,[3] that the court "

1. DIGEST, 59.
2. Though not favored, it has been regarded as legal in our ser ever since it was sanctioned by the Secretary of War on Gen. H trial in 1814. The Secretary there held that new members might added pending a trial, "the proceedings as recorded being reac them." See published Trial, appendix, p. 29. From this ruling d also the authority for the returning to the court of absent member subject to be considered in Chapter XII.
3. I Opins., 299, 300.

not a legal" one "if thirteen could have been convened without manifest injury to the service." He adds:—"It is difficult to conceive an emergency so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, without manifest injury to the service. And if a smaller number act without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sentence would be murder." He concludes by suggesting to the Secretary of War "as a matter of legal propriety, that in every case of life and death at least, the President ought to be satisfied of the manifest injury which the service would have sustained in convening a court of thirteen before he gives his sanction to a sentence of death by a smaller number."

This case was one which occurred in time of peace, when death sentences are required to be confirmed by the President, and, being of an extreme class, it was proper that the fullest weight should be given to any legal doubt as to the validity of the proceedings. But the theory that the question of "manifest injury" is reviewable by the President, or any authority superior to the officer who ordered the court, has ceased to be admissible since the specific adjudication on the subject, in 1827, by the Supreme Court in the case of Martin *v.* Mott.[1] In this case, Story, J., in construing the provision of the Article under consideration, held that the same was "merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive." This ruling settled the law on this point,[2] and the question as to the legality of a court of less than thirteen members is not now raised in practice.

In the form of Order for convening a general court, given in the Army Regulations, (§ 881,) and commonly employed, it is indicated as to be added after the recital of the officers detailed, when less than thirteen—"A greater number of officers than those named cannot be assembled without manifest injury to the service." This regulation, however, is not in terms or in effect a requirement, the addition of the clause, though usual, is not

1. 12 Wheaton, 34.

2. See II Opins. Atty. Gen. 535; VI Id. 511; Wooley *v.* U. S., 20 Law Rep. 631. G. O. 4, Mil. Div. Atlantic, 1874; also Clode, (M. L.,) 123.

necessary, and its omission will affect in no manner the vali of the Order. The mere fact that less than thirteen *are* det will constitute a sufficient indication of the determination b convening officer, in his discretion, that a greater number ca in fact be assembled without the prejudice to the service con plated by the Article.[1]

Supernumerary Members. It remains to notice a prac which at one time prevailed in our service, of detailing, w court of thirteen, (and sometimes with a court of a lesser num one or more additional officers as "supernumeraries," whose pose was to supply the places of such original members as n be excluded on challenge, or whose seats might be vacate absence,—thus keeping the court always up to the maxin These officers took their seats with the court and were sworn it, were subject to challenge, were present during the trial permitted to take part in discussions on interlocutory ques but not to vote thereon, and retired—if not previously beco full members—when the court was finally cleared to delib upon its findings and sentence.[2] This practice, however, h statutory sanction, and, in substantially adding members limited indeed but material powers to the maximum of thir was in fact in contravention of the Article of war. It has disused in our service for some forty years,[3] though in the B it still subsists in a different form.[4]

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1. See O'Brien, 228. The early case of Mills *v.* Martin, 19 Joh (1821,) is, in effect, *contra*. But the provision under consideratio not then received the interpretation subsequently given it in Ma Mott.

2. See De Hart, 88; Macomb, 15; O'Brien, 226; Benét, 28 Coppée, 46, 54. Supernumeraries are constantly detailed with g courts in the early Orders of the War Department, &c., especiall 1809 to 1836. In each of the cases of Gens. Hull, Wilkinson and C three supernumerary members were named in the original Supernumeraries were also detailed in the navy, and for courts than thirteen members. See I Opins. At. Gen., 698.

3. The paragraph, (§ 237,) of the Army Regulations of 1841, ing the detailing of "one or more supernumeraries" with co thirteen members, does not appear to have been repeated in any quent issue. A comparatively recent, though isolated case, is pub in G. O. 9, Dept. of the Mo., 1862, of a general court attended by a numerary, who, upon a vacancy occurring on the trial of an office a seat as a member.

4. The British law authorizes the convening authority to detai the regular members, "such *waiting officers* as he thinks exped with a view "to provide for casualties or for the case of challenges allowed." Rules of Procedure, § 17 (D,) 25 (G;) Simmons, § 42

CHAPTER VIII.

THE JURISDICTION OF GENERAL COURTS-MARTIAL.

The subject of the jurisdiction of general courts-martial will be considered under the following heads:—

I. The Place or field over which such jurisdiction extends or within which it may be exercised;

II. The period of Time to which its exercise is limited;

III. The Persons who are subject to it;

IV. The Offences which it embraces.

I. THE PLACE OR FIELD OF JURISDICTION.

It includes the entire United States. The jurisdiction of general courts-martial is coextensive with the territory of the United States. That is to say, a general court assembled at any locality within that territory may legally take cognizance of an offence committed at any *other* such locality whatever; such a court, unlike a civil tribunal, not being restricted in the exercise of its authority to the limits of a particular State or other district or region. While it will in general be more for the interest and convenience of the service to bring an accused officer or soldier to trial at or near the place of his offence, he may, with equal *legality* be tried by a court convened, (by competent authority,) in any other part of the United States.[1] This is a general principle, nor is its application limited to cases in which the court is convened by a commander whose command is conterminous with the federal domain—as the President as Commander-in-chief, or the general commanding the army. A court ordered by a department commander within his department, for the trial of an officer or soldier of his command, make take cognizance of the case hough the offence or offences may have been committed in any ther department or departments. It may be added that the

1. See DIGEST, 207.

question, whether an offence was or not committed at a pla over which exclusive jurisdiction has been reserved or ceded the United States, can affect in no respect the jurisdiction of tl *military* court before which such offence is brought for trial.[1]

Extends to Region of Military Occupation in Wa Further, such jurisdiction extends to the places or territory he or occupied by our armies when invading the domain of a forei nation with which we are at war. A court-martial, wheth assembled in the foreign territory or in the United States, w have jurisdiction of military offences committed within su places equally as if committed on our own soil.[2]

Effect of Principle of Extraterritoriality. Such jur diction extends also to offences committed by our officers or s diers within the lines or in the neighborhood of our armies, wh in the transit, by the permission of its government, through t domain of a foreign nation with which we are at peace. Tl on the principle of international law known as "extraterri riality," under which when the armies of one nation are pri leged to enter or pass through the territory of another frienc nation, the laws of the former are deemed to continue to ap to its forces equally as if the same were within their own countr Such, for example, would be the legal status of our troops wh permitted by the government of Mexico to cross the frontier carrying on hostilities against Indians.[4]

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1. As to this question, as affecting the jurisdiction of *civil* courts, DIGEST—"Cession of Jurisdiction," pp. 141–144, and authorities cit also PART III, *post*.

2. "Wherever our army or navy may go beyond our territo limits, neither can go beyond the authority of the President or the le lation of Congress." Chase C. J., in Ex parte Milligan, 4 Wallace, 1 And see V Opins. At. Gen., 58; Coleman *v.* Tennessee, 97 U. S. 5 516. In the latter case the law was applied to offences committed soldiers of our army when in occupation of insurrectionary distr during the late war, and it was held that, (as in the case of an army l fully marching through the territory of a foreign country—see *post*,) army was then exempt from amenability to the local courts and sub only to the jurisdiction of its own military tribunals.

3. "This privilege is extended to armies in their permitted tra through foreign territory," and includes the right "of exercising milit discipline on the officers and soldiers. * * * When the transi troops is allowed, it is apt to be specially guarded by treaties." Wool Int. Law, 64; Vattel, III, 7 § 130. And see The Exchange, 7 Cran 139; Coleman *v.* Tennessee, 97 U. S., 515.

4. Since the above was written, a formal agreement has in fact b

Cases of Offences committed in Friendly Foreign Territory, entered without Authority. A status less clearly defined in law is that of our military forces when induced, in pursuit of Indians or marauders or for other purposes, to enter the territory of a foreign power with which we are at peace, *without its authority.* While such an entry of an armed body would be *per se* unlawful,[1] it is nevertheless the opinion of the author that military offences committed by any of such forces on the foreign soil would properly be cognizable by courts-martial convened within the United States, provided the offender at the time of the offence was a member of an organized detachment or other force under military command and discipline. For while a refusal to cross the boundary under the circumstances might not constitute a disobedience of a "lawful command" in violation of the 21st article of war, it does not follow that an act of insubordination, neglect, or disorder, after the passing of the frontier in obedience

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entered into between the governments of the United States and Mexico, stipulating for "the reciprocal crossing in the unpopulated or desert parts of the international boundary line, by the regular federal troops of the respective governments, in pursuit of savage hostile Indians." This agreement, originally made in July, 1882, to continue in effect for one year, has been since twice renewed, and under the last renewal will remain in force till Oct. 31, 1885. See G. O. 91, 118, of 1882; Do. 57 of 1883; Do. 128 of 1884. Of this agreement the only portion that need be cited in this connection is the following: "ART. VI. The abuses which may be committed by the forces which cross into the territory of the other nation shall be punished by the government to which the forces belong, according to the gravity of the offence and in conformity to its laws, as if the abuses had been committed in its own territory, the said government being further under obligation to withdraw the guilty parties from the frontier."

1. It would, in the first instance, be unlawful for any subordinate commander to direct such an invasion or command the invading party, except under orders emanating from the highest authority. In Com. *v.* Blodgett, 12 Met. 84, 90, the court say:—"Nothing but the sovereign power of the State, by a previous order directing such invasion, or by a subsequent ratification when done in its name, will warrant such invasion, and excuse the subordinates engaged in it. * * * Such act is a high prerogative of sovereignty and the necessity of it must be judged of, and the warrant for it must be given, by the express command or direction of the sovereign authority." Note, in this connection, G. O. 97 and 100, Dept. of the East, 1864. In the former, military commanders near the Canadian boundary were instructed by General Dix to cross the same where necessary in pursuit of marauders, and pursue, capture and bring them within the United States for trial and punishment. In the latter, it was announced that this instruction had been *disapproved* by the President and was accordingly revoked.

to orders, would not be cognizable and punishable as a milit offence equally as if committed within our own territory.[1] I an offence committed by a soldier on foreign soil, when not th in a military capacity—as when he is there as a deserter—wo in general be an offence only against the laws of such nation, at least not one against the laws of the United States, and so within the jurisdiction of a court-martial.[2]

II. THE TIME WITHIN WHICH JURISDICTION IS TO EXERCISED.

As affected by the Limitation of Art. 103. If the ju diction of a general court-martial can properly be regarded controlled in its exercise by any general rule of limitation as *time*, such general rule is that prescribed in the 103d Article war, as follows:—"*No person shall be liable to be tried and p ished by a general court-martial for any offence which appear have been committed more than two years before the issuing of order for such trial, unless, by reason of having absented hims or of some other manifest impediment, he shall not have been am able to justice within that period.*"

But the question here arises whether this Article is to be view

1. See DIGEST, 207, 208. In the case of Pvt. Joseph Lee, convic by a general court-martial in Texas of manslaughter, consisting in homicide of a sergeant of the detachment while on a scout wit Mexico,—in which the proceedings and sentence were approved by G Ord in G. C. M. O. 17, Dept. of Texas, 1877,—it was held by the S retary of War, June 23, 1877, that the court had jurisdiction of the ca *Contra*, see G. C. M. O. 35, Dept. of the Missouri, 1872, where it held that an offence—insubordination and disrespectful conduct to a co manding officer—committed by a soldier while on a scout within Mexi territory, could not legally be taken cognizance of by a court-mar subsequently convened in New Mexico, on the ground that the co mand was in the foreign country without authority of law.

2. See DIGEST, 207–8. In G. O. 119, War Dept., 1863, an offi of volunteers is dismissed by the President "for violation of the s ereignty of a friendly foreign State, in arresting a deserter from the S. forces and bringing him away from within the boundaries of Canad In this connection, the student may desire to consult the authori on the disputed question, whether a State court has jurisdiction *larceny* committed in a foreign country where the property stole brought within such State—a question decided in the affirmative State *v.* Bartlett, 11 Vt. 650, and State *v.* Underwood, 49 Maine, and, upon what is regarded by the author as sounder reasoning, in negative, in Com. *v.* Uprichard, 3 Gray, (Mass.,) 440.

as a prohibitory restriction upon *jurisdiction*, or merely as providing a *defence* to be taken advantage of by special plea.

View of Attorney General Wirt. It was held at an early date, (1820,) by Mr. Wirt,[1] in construing this Article, that the limitation thereby prescribed was *absolute* in all cases and could not be *waived*. The reason assigned for this opinion was in effect that the Article was an enactment based upon considerations of *public policy*, being intended not solely for the benefit of the accused but to secure that prompt and certain prosecution of military offences which is essential to maintain the discipline of the service; and that therefore it was to be regarded as prohibitory not only upon the United States but upon the accused also. The view of Mr. Wirt, that the limitation was not waivable, has been affirmed by later Attorneys General,[2] and in the practice of the army has been long recognized as a rule of law to which no exceptions could be admitted.[3] And it has been held by the Judge Advocate General,[4] and subsequently by the Attorney General,[5] that an accused could not, by a *plea of guilty* at the trial, any more than by previously requesting,[6] or by consenting without objection, to be tried, waive the limitation and withdraw the case from the application of the Article, where it appeared from the charge that the offence had been committed more than two years before the ordering of the court.

Ruling of the U. S. Circuit Court. If this view as to the effect of the Article is the correct one, the subject of the limitation is properly to be considered in the present Chapter. But though this view was apparently that taken by the U. S. District Court for the Southern Dist. of New York, in 1880, in Davison's

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1. I Opins., 383. Compare this view with the converse view expressed by him, in I Opins., 233, as to the waiver of the benefit of the provision of Art. 102, a point heretofore remarked upon in Chapter XVI—"Waiver of the right to plead former trial."

2. VI Opins. At. Gen. 239; XIII Id., 463; XIV Id., 267–8; XVI Id., 173.

3. See the opinion, as adopted by the Secretary of War, of Judge Advocate General Holt, in the case of Brig. Gen. Dyer, Chief of Ordnance. Proceedings of Court of Inquiry, Part II, pp. 612–614.

4. DIGEST, 86.

5. XVI Opins. 170.

6. See Gen. Dyer's Case, *ante*.

case,[1] the judgment in that case was, in 1884, reversed on a
in the U. S. Circuit Court, Second Circuit,[2] where it was in
stance held that the limitation of Art. 103 was not a jur
tional objection but a "matter of defence;" the court
adopting the ruling which had been made at San Francis
the previous year, in White's Case,[3] by the Circuit Court fc
Ninth Circuit. In these cases the courts, in effect though r
terms, overrule Mr. Wirt's opinion, and treat the military st
of limitations as the United States' and State statutes of li
tions relating to crimes are ordinarily treated, *viz.* not as
striction upon the powers of the court but as a provision s
or mainly for the benefit of the accused, which can be t
advantage of only by plea.

In deference to these recent rulings of high authority, the
ject of the application and operation of the provisions of Art.
which had formed part of the present Chapter, has been i
porated in Chapter XVI, on PLEAS and MOTIONS.

As affected by the Continuance of War. While th
mination of a state of war does not, as such, affect the jurisdi
of a court-martial, as it does that of a military commissic
tribunal whose action is determined by the existence and co
uance of war—there are yet cases in which, by the ex
terms of a statute, or by implication from its terms, the jur
tion of a court-martial over certain specific offences is resti
to the period of war. Thus the 58th Article of the cod
pressly makes the offences therein enumerated punishab
sentence of general court-martial only in time of war, rebe
&c., and if in any case the war which prevailed at the con
sion of the offence has ended[4] before the same is actually brc
to trial, the court will not be legally competent to take co
ance thereof under this Article. Similarly, it has been helc
Sec. 1343, Rev. Sts., relating to the offence of the spy, ini
tially limits the trial by court-martial of a spy to the peri
the duration of the war, &c., so that if not brought to tri
fore the war is terminated, he cannot be tried at all.[5]

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1. *In re* Davison, 4 Fed. Rep. 507.
2. 21 Fed. Rep. 618.
3. *In re* White, 9 Sawyer, 49, before Field and Sawyer, JJ.
4. As to what constitutes a legal termination of a state of w
Chapter XXV—FIFTY-EIGHTH ARTICLE.
5. *In re* Martin, 45 Barb. 142; Wells on Jurisdiction, 577.

The term "*war*," as employed here and elsewhere in this treatise, is to be understood as including not only foreign or international war, but also civil war, as well as a state of active hostilities with an Indian tribe.

III. THE PERSONS SUBJECT TO THE JURISDICTION.

Classification. General courts-martial, created and empowered as they are by express statute, can exercise jurisdiction over such persons and offences only as are constitutionally brought by statute within their cognizance. By the articles of war and other statutes certain classes of persons are rendered, or declared to be, amenable to the jurisdiction of courts-martial as follows:—I. The Army of the United States; II. The militia when called into the service of the United States; III. Officers and soldiers of Marines when detached for service with the Army; IV. Certain civilians subjected to military discipline in time of war; V. Certain other civilians.

I. THE ARMY OF THE UNITED STATES.[1]

In this designation are embraced the following:—1. The Standing or "Regular" army; 2. Volunteers; 3. Drafted men.

1. The Regular Army. The constituents of this army are the officers, soldiers and others specified in Sec. 1094, Rev. Sts., *viz:* certain general officers and their aids, certain officers and enlisted men of the staff departments and of the enumerated regiments of artillery, cavalry and infantry, a force of enlisted Indian scouts, the corps of professors and cadets[2] of the Military Academy, and the officers and enlisted men of the retired list.[3] These members of the regular army of whatever grade are all military persons: there exists no longer in our service what was once styled

1. The President, though commander-in-chief, is not a part of the army or a military person. In Parker *v.* Kaughman, 34 Ga. 136, it was held that the President of the "Confederate States," being commander-in-chief, was "in the army;" but this was probably a misconception.

2. That Cadets have always been a part of the Army, see Morton *v.* U. S., 112 U. S., 4.

3. That retired officers are a part of the army and so triable by court-martial,—a fact indeed never admitting of question,—is adjudged in Tyler *v.* U. S., 16 Ct. Cl. 223; Id., 105 U. S., 244; Runkle *v.* U. S., 9 Ct. Cl. 396. By the recent Act of Feb. 14, 1885, enlisted men of the army and marine corps were made eligible to retirement after thirty years' service.

the "civil branch" of the army. Our surgeons, paymast chaplains, storekeepers, &c., are all now commissioned office the same manner as are the officers of the line, and, whethe not having commands, are, equally with the latter, military cers. The professors of the Academy, though without rank, as indicated in the foregoing Chapter, commissioned officers; even the cadets, whose status was for a long period not cle defined,[1] are now held to be 'inferior officers appointed tho not commissioned.'[2]

In time of *peace*, the "regular" army ordinarily constit the entire Army of the United States.

2. Volunteers. In time of war the regular contingent commonly been supplemented by a force of volunteer troops the late war indeed the volunteers composed by far the gre portion of our army. Though in some particulars of its or ization assimilated to the militia, this force is in fact as wel in law quite distinct therefrom. Originated under the const tional power "to raise armies," not under the power "to vide for calling forth the militia," it is also distinguished f the militia in the persons composing it, in the period of their s ice, and in the duties upon which they may be employed. militia is composed of citizens between 18 and 45 years of (Rev. Sts., Sec. 1625,) their term of service cannot exceed months, (Id., Sec. 1648,) and they cannot be used for the inva of a foreign country or for military service abroad.[3] The emp ment of volunteers is not limited by any of these restricti That this force, though differing from the regulars in that resorted to for a temporary purpose,[4] is, equally with the la a part of the *armies of the United States*, has, (as indicated in last Chapter,) been expressly held and adjudged.[5]

1. As to the status of the Cadets as viewed by the Attys. Gen see I Opins. 276, 469; II Id. 251; VII Id. 323; XVI Id. 611. they are liable to trial by garrison, (as well as by general,) co martial was held by Wirt, (I Opins. 469,) and affirmed by Cus (VII Id. 323.)

2. Babbitt *v.* U. S., 16 Ct. Cl. 202.

3. McCall's Case, 5 Philad. 259.

4. VII. Opins. At. Gen., 621.

5. Burroughs *v.* Peyton, 16 Grat. 483; Kerr *v.* Jones, 19 Ind. Wantlan *v.* White, Id. 470; DIGEST, 60, 424, 478. And see III C At. Gen. 696; VI Id. 484; VII Id. 621.

3. Drafted Men. Through the necessities of the government there came to be added, during the recent war, to the Army of the United States a further body of *drafted men*, who entered the military service not as volunteers but compulsorily under the provisions of the Act of March 3, 1863, c. 75, and the succeeding statutes in amendment, &c., of the same. Owing to the defects in the operation of the existing militia systems of the States,[1] and to the fact that the *materiel* of the militia was limited to citizens,[2] the measure of adding to the military strength of the country by calling out the militia had, notwithstanding the authority to enrol this force conferred upon the President by the Act of July 17, 1862, proved quite inadequate to the emergencies of the period. The Act of 1863 was therefore passed by which all able-bodied citizens of the United States and all aliens who had declared their intention to become citizens, between the ages of twenty and forty-five years, were constituted "national forces," and required to be enrolled subject to draft by the United States authorities. This Act did not repeal that of 1862, but being "more matured in its details than any system that could have been organized for the militia" under the other,[3] as well as more efficient and comprehensive in its operation, was resorted to almost exclusively in lieu of the former statute.[4] The Act of 1863 and the system thereby inaugurated have received an especially careful examination in McCall's Case[5] and the leading case of Kneedler *v.* Lane,[6] in which the Act was held to be a constitutional exercise of the power of Congress "to raise armies," and the troops raised by draft under the machinery which it provided were held to constitute a part of the armies of the United States.[7] As such they were of course subject to trial by court-martial.[8]

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1. McCall's Case, 5 Philad. 267. It was anticipated by Hamilton in the Federalist, (p. 117,) that the militia could not be depended upon as an adequate force for war. And see Com. *v.* Barker, 5 Bin. 429; U. S. *v.* Blakeney, 3 Grat. 417.
2. VI Opins. At. Gen., 484.
3. McCall's Case, 5 Philad. 268.
4. Subsequently to its passage there was but one call for militia, (limted to four States),—that by proclamation of June 15, 1863.
5. 5 Philad. 259.
6. 45 Pa. St. 238.
7. That conscripts are not militia but a part of the Army, see also Burroughs *v.* Peyton, 16 Grat. 483; Cooley, Prins. Const. Law, 89.
8. Instances of "drafted men," tried as such by general court-mar-

General Provision of Sec. 1342, Rev. Sts. Thus defi the Army of the United States, whether composed solely—a time of peace—of the regular army, or—as in time of war this and one or both of the other contingents named, is, whole, made subject to the jurisdiction of courts-martial by Section, which, in prefacing the military code, declares: " armies of the United States shall be governed by the follo rules and articles." Certain particular classes—as the re officers, by Sec. 1256, Rev. Sts.—are made specifically so sub but such provisions are unnecessary in view of this general actment.

The opinion once expressed by Atty. Gen. Wirt,[1] to the e that no military persons or forces could properly be treate subject to the articles of war, unless so subjected in specific t by the separate statute making them a part of the army or c specific provision, if ever sound, certainly cannot now be m tained in view of the comprehensive terms of Sec. 1342. N whenever any addition is made to the army, the person or f added will, without any such express provision in the statut once come within the general application of this Section, an thenceforth subject to the military jurisdiction.

Beginning and End of the Personal Amenabili General Rule. Here, as especially applicable to officers soldiers of the army proper, may suitably be considered the sul of the duration or continuance of the amenability of the *pe* to the military jurisdiction.

It is the *general rule* that the person is amenable to the m tary jurisdiction only during the period of his service as an of or soldier. Thus, in the case of an *officer*, the jurisdiction c mences with the acceptance of his appointment or commiss

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tial, for desertion in failing to report under the draft, &c., are espe frequent in the G. O. of the Depts. of the East, of Pennsylvan the Susquehanna and the Monongahela, and of the Middle Dept., 1863 to 1865.

1. I Opins., 277–9.

2. In the case of an officer appointed during a recess of the Se but whose appointment is not subsequently acted upon and confi thereby, the amenability continues from his acceptance of his app ment to the last day of the session of the Senate next succee (Const., Art. II, secs. 2 & 3; IV Opins. At. Gen. 30.) The app ment, however, of an officer appointed during a recess may be re by the President without being submitted to the Senate, (VIII C

or where originally appointed by State authority, with his muster, (or re-appointment,) into the service of the United States, and ends with his death, the acceptance of his resignation, his dismissal,[1] &c., or—if a volunteer officer—his discharge or muster-out, &c.: in the case of a *soldier*, it begins with his enlistment[2] or muster into the service, and ends with his discharge or muster-out.[3] In other words, the general rule is that *military persons*—officers and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army.[4]

Jurisdiction after end of Term of Service but before Discharge. While the soldier, since he cannot discharge himself, is in general entitled at the expiration of his term of enlist-

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380,) and the appointment of any officer may be withdrawn after it has been submitted to the Senate, but before it is finally acted upon. In such cases the jurisdiction would cease with the recall or withdrawal.

1. The early English ruling in Sackville's Case, (1760,) to the effect that an officer, after having been dismissed the service and become a civilian, could, at his own request or with his consent, legally be brought to trial by a general court-martial, has not been followed in the later English law, and has never been adopted in our own. (See DIGEST, 209.) In our practice no trial of a dismissed officer has ever been had, except by the authority of some express statute hereafter to be considered.

An officer who has been dropped from the rolls for desertion under Sec. 1229, Rev. Sts., is assimilated to a dismissed officer in that he cannot thereafter be made amenable to trial by court-martial. See G. C. M. O. 16, War Dept., 1871.

2. It should be noted that it is not necessary that the enlistment be a formal one, but that receipt of pay, performance of service as a soldier, &c., may be equivalent to, or constitute evidence of enlistment. See DIGEST, 248–9; Grant *v.* Gould, 2 H. Black. 69; Tytler, 111; Prendergast, 39; Clode, M. L., 93; also, *post*, chapter XXV—FORTY-SEVENTH ARTICLE.

3. The discharge must of course be due and legal, not fraudulent. See DIGEST, 232; XVI Opins. At. Gen., 349.

4. DIGEST, 208, 209, 211. And see the principle, that the jurisdiction ends with the discharge—whether honorable or under a sentence—recognized in the following General Orders: G. C. M. O. 4, 16, War Dept., 1871; G. O. 42, Dept. of the East, 1865; Do. 43, Middle Dept., 1865; Do. 90, Dept. of Pa., 1865; Do. 101, Dept. of Va., 1865; Do. 22, Dept. of the Mo., 1866; Do. 23, Dept. of Dakota, 1871; Do. 55, Dept. of Cal., 873; and in V Opins. At. Gen. 58–9.

ment to be forthwith discharged in the form and by the authority prescribed by the 4th article of war,[1] there are yet cases where, for offences previously committed, he may be held for trial by court-martial for a period after his term is completed, his right of discharge being meanwhile suspended. These cases are as follows:

1. Cases of deserters under Art. 48. This article, in providing that—"*Every soldier who deserts the service of the United States shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment,*" goes on to declare—"*and such soldier shall be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.*" The effect of this article is to continue the jurisdiction of a general court-martial over a *deserter*, without regard to the duration of his term of enlistment, provided of course the statutory limitation of Art. 103 has not taken effect.

It need hardly be added that here, as in other cases of soldiers liable to trial, the Government may by its own act, *i. e.* by a formal discharge of the soldier, terminate his amenability under the article.[2]

2. Deserters illegally enlisted. It has been ruled in a series of adjudged cases[3] that, even if an enlistment be voidable for illegality, (as in the instance of a minor enlisted under the legal age,) so that the soldier or his parent or guardian would be entitled to, or properly granted, his discharge if duly applied for, yet if, after the enlistment, he *deserts*, he may, upon arrest, be held, tried and punished for his offence, and an application for his discharge made to the Secretary of War, or on *habeas corpus* to a U. S. court, will not properly be granted. In such cases the military jurisdiction is sustained for the reason that the interest of the public in the administration of justice and maintenance of military discipline is paramount to the right of the individual.

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1. DIGEST, 2. And see U. S. *v.* Travers, 2 Wheeler, C. C. 509, (Story J.;) Prendergast, 42; also, *post*, Chapter XXV—FOURTH ARTICLE.

2. DIGEST, 23, 209.

3. Com. *v.* Gamble, 11 S. & R. 93; McConologue's Case, 107 Mass. 170; In matter of Beswick, 25 How. Pr. 149; *Ex parte* Anderson, 16 Iowa, 599.

3. Offenders in general—Attaching of jurisdiction. It has further been held, and is now settled law, in regard to military offenders in general, that if the military jurisdiction has once duly *attached* to them previous to the date of the termination of their legal period of service, they may be brought to trial by court-martial after that date, their discharge being meanwhile withheld. This principle has mostly been applied to cases where the offence was committed just prior to the end of the term. In such cases the interests of discipline clearly forbid that the offender should go unpunished. It is held therefore that if before the day on which his service legally terminates and his right to a discharge is complete, proceedings with a view to trial are commenced against him,—as by an arrest or the service of charges,—the military jurisdiction will fully attach, and once attached may be continued by a trial by court-martial ordered and held after the end of the term of the enlistment of the accused. The leading adjudication on this point is that of the Supreme Court of Massachusetts in *In re* Walker,[1] (1830,)—a case of a seaman in the navy, but the ruling in which is equally applicable to soldiers of the army. Here the court, in adverting to the injurious results that might ensue were such a person permitted to be guilty with impunity of grave offences on the last days of his engagement, adds:—"It is true that a seaman is not bound to do service after the expiration of his term of enlistment. But within that term he is bound to observe the rules and regulations provided by law for the government of the navy, and is punishable for all crimes and offences committed in violation of them during his term of service. * * * In this case the petitioner was arrested or put in confinement, and charges were preferred against him to the Secretary of the Navy, before the expiration of the time of his enlistment; and this was clearly a sufficient commencement of the prosecution to authorize a court-martial to proceed to trial and sentence, notwithstanding the time of service had expired before the court-martial had been convened." This case, since affirmed in principle by other rulings,[2] has always been regarded as controlling authority in the military practice.

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1. 3 Am. Jur. 281. And see DIGEST, 210.

2. See U. S. *v.* Travers, 2 Wheeler, C. C. 509; In the matter of Dew, 25 Law Rep., 540; *In re* Bird, 2 Sawyer, 33; Barrett *v.* Hopkins, 2 McCrary, 129.

Jurisdiction during Absence on Leave or as a Prisoner of War. Here should be noticed a class of cases in which an officer or soldier, though fully in the service, is, in a measure, not subject to the military jurisdiction.

Thus, when an officer or soldier is duly absent from his post or station upon a leave of absence or furlough, he ceases for the time to be subject to the orders of his commander,[1] or indeed to any orders except—in the event of some public emergency or grave occasion justifying it—an order discontinuing his leave and directing him to return to his regiment, &c., or otherwise disposing of him as the public interest may require. During the pendency of his leave, therefore, he cannot well be guilty of a breach of the discipline of the command from which he is absent, or of a neglect of duty, or disobedience of orders, (except as above indicated,) or mutiny, or subject to a military trial therefor.[2] So, if he commit a crime or offence against the laws of the land, he will not properly be triable for the same by a military tribunal, but will be amenable therefor to the civil authorities in the first instance and without any previous application by them to a military commander for the surrender of his person under the 59th article of war.[3] But for an act, not of insubordination to command or in neglect or violation of orders, but unbecoming an officer and a gentleman, or to the dishonor of the military service in general, as well as for an offence of the class specified in the 60th article of war, an officer or soldier, though on leave at the time, may in general legally be held subject to military jurisdiction and trial.

So a *prisoner of war* in the hands of the enemy, while not in general subject to command or answerable for a disobedience of an order, may become amenable to trial by court-martial for a disorder—such, for example, as an indulgence in grossly con-

1. "Out of command and out of service are different things in a military sense. An officer on furlough is out of command, absent from the army," though "not out of the service." Cushing, VI Opins. 252 'An officer on leave has, for the time being, no post or duty.' XIII Id 527. And see the recognition of the difference between the status of being on duty and that of being on furlough or leave of absence—in J. R. of April 12, 1866.

2. DIGEST, 10, 215–6. He may of course commit and become amenable for a *desertion*, an offence not unfrequently committed by soldiers when on furlough.

3. *Ex parte* McRoberts, 16 Iowa, 603; G. O. 29, Dept. of the Northwest, 1864; DIGEST, 31.

tumelious language[1] or injurious conduct toward another officer in the same status.[2]

Exceptions to the General Rule—Amenability after Discharge. To the general rule above indicated, that the military jurisdiction ends with the discharge, &c., of the officer or soldier, there are several *exceptions*, created by or held to result from certain express statutory provisions. These statutes are the Sixtieth Article of war, and Secs. 1230, 1361, 4824, and 4835, Rev. Sts.

The Sixtieth Article. This Article, which is a statute for the punishment of certain frauds, embezzlement and conversion of public property, &c., when committed by military persons, after defining the offences to which it relates, concludes as follows:—"*And if any person, being guilty of any of the offences aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed.*"

A similar article is contained in the naval code, the original of the statute being a general enactment of March 2, 1863, in terms applicable to army, navy and civilians alike.[3]

The amenability to prosecution and trial created by this provision is not unlimited as to time, but is subject to the restriction imposed by Art. 103.[4] Instances of trials ordered under it have been unfrequent in practice.[5]

Sec. 1230, Rev. Sts. This section, under which an officer once dismissed by order of the President may be allowed a trial

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1. See an instance in G. C. M. O. 425, War Dept., 1865, of an officer convicted of an offence of this character committed while held as a prisoner of war at Danville, Va.

2. It need hardly be added that a prisoner of war *on parole* is subject to the military jurisdiction for such military offences as, under the terms or circumstances of his parole, he may be called to account for.

3. See Secs. 5438, 5439, Rev. Sts. The 60th Art. is treated of in Chapter XXV.

4. See Chapter XVI.

5. Cases of such trials are to be found in G. C. M. O. 16, War Dept., 1871; G. O. 35, Div. West Miss., 1865; Do. 22, Dept. of the Mo., 1866; Do. 13, Dept. of the South, 1867; also in G. O. 143, Navy Dept., 1869.

by court-martial for the offence for which he was dismissed, has already been considered, in Chapter VI, in treating of the authority of the President to convene courts-martial. As has been seen, it is a provision originally enacted in time of war, and which, under the existing law, applies only to cases arising in war.

Sec. 1361, Rev. Sts. By this statute a further exception to the above general rule has been in effect created in cases of soldiers confined in the Military Prison at Leavenworth, Kansas, under sentences which imposed dishonorable discharge in connection with confinement, and who accordingly have been formally discharged in fact, prior to being imprisoned. The section provides that all persons confined under sentence in said prison "shall be liable to trial and punishment by courts-martial under the rules and articles of war for offences committed during the said confinement." It applies only to the particular place of confinement mentioned—has no application, for example, to the prison at Alcatraz Island, California.[1] Trials of discharged soldiers under confinement have been had from time to time under this provision; the accused, who are really *civilians*, being designated in the proceedings as "military convict," or "military prisoner."[2]

Secs. 4824 and 4835, Rev. Sts. By the former of these statutes the inmates of the "Soldiers' Home," who are mostly discharged soldiers of the army, are made "subject to the rules and articles of war in the same manner as soldiers in the army." By the latter, the inmates of the "National Home for Disabled Volunteer Soldiers," who are all discharged officers or soldiers of volunteers employed during the late war, are made similarly subject "in the same manner as if they were in the army." In practice, however, courts-martial are not resorted to for the discipline of these classes of persons.[3]

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1. DIGEST, 213; G. C. M. O. 4, War Dept., 1871; Do. 55, Dept. of Cal., 1873.

2. See cases of such trials in G. C. M. O. 92, Dept. of the Mo., 1875; Do. 3, Id., 1878; Do. 28, Id., 1880; Do. 96, 168, Id., 1882; Do. 1, 11, 24, 30, 46, 61, Id., 1883; Do. 5, 14, 19, 35, 40, 44, 58, Id., 1883; Do. 3, 5, 1885. In the first mentioned order is included the case of Wildman commented upon in DIGEST, 212–3, note.

3. But one trial is known to have ever been had. See DIGEST, 21

The five statutes here specified will be recurred to later in this Chapter, and the question of their *constitutionality* considered.

Jurisdiction after a Second Appointment or Enlistment. It remains to refer to the effect, *per se*, of a subsequent appointment or enlistment of an officer or soldier, (once duly dismissed, resigned, &c., or discharged,) upon his amenability to trial for an offence committed prior to such discharge, &c., (and within two years,) but not yet made the subject of a charge or trial. Upon this point there is not known to have been any adjudication. Putting out of the question the class of offences, the amenability for which is expressly defined by the 60th article, it is the opinion of the author that, in separating in any legal form from the service an officer or soldier or consenting to his separation therefrom, and remanding him to the civil status at which the military jurisdiction properly terminates, the United States, (while it may of course continue to hold him liable for a pecuniary deficit,) must be deemed in law to waive the right to prosecute him before a court-martial for an offence previously committed but not brought to trial. In this view, a subsequent re-appointment or re-enlistment into the army would not revive the jurisdiction for past offences, but the same would properly be considered as finally lapsed.[1]

Jurisdiction as Affected by Amenability to Civil Proceedings. That the offender may be amenable to a criminal court of the United States or of a State, by reason of such court having concurrent jurisdiction of his offence, or jurisdiction of a civil offence involved in the act committed, cannot affect the exercise of jurisdiction by the court-martial. This principle and its converse—that liability to trial by court-martial does not affect the liability of the party to civil trial or suit, for a civil offence or cause of action involved in the act—were first fully impressed upon the army by the cases (of homicide) of Capt. Howe and Asst. Surgeon Steiner,[2] and have been abundantly illustrated in subsequent rulings and Orders.[3] Where indeed the civil juris-

1. See DIGEST, 209.
2. G. O. 25 of 1840; VI Opins. At. Gen. 413, 506; VIII Id. 328.
3. G. C. M. O. 20 of 1869; Do. 50, Dept. of the Mo., 1871; G. O. 78, Dept. of the East, 1869; Do. 69, Id., 1870; Do. 52, Dept. of the Pacific, 1865; *Ex parte* McRoberts, 16 Iowa, 606; U. S. *v.* Carr, 1 Woods, 386; *Ex parte* Mason, 105 U. S., 699; U. S. *v.* Cashiel, 1 Hughes, 552; State

diction is the first to be initiated, the *court-martial* cannot properly take cognizance of the military offence till the party is wholly discharged from the civil proceeding;[1] but its jurisdiction remains unimpaired, and may be freely exercised at the proper time, whether the accused may have been acquitted or convicted by the civil court.

The subject of double amenability and jurisdiction will be recurred to in another part of the work.[2]

II. The Militia when Called into the Service of the United States.

Occasions of Amenability. Under the subject of the Composition of General Courts-Martial, we have seen what the militia is, and have referred to the series of statutes regulating its organization, service, &c. It remains to consider when and how officers and soldiers of the militia become amenable to the jurisdiction of courts-martial of the United States.

The statute law and the judicial decisions recognize two occasions upon which this amenability attaches, viz. (1) when the militia, being actually employed in the federal service, "in time of war or public danger,"[3] commit military offences; and (2) when they commit the offence of refusing to be so employed. There is a marked distinction between the two instances, from the fact that in the one the militia are a part of the military forces of the United States and subject to the articles of war, while in the other they are no part of such forces and not so subject.

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v. Rankin, 4 Cold. 145; State *v.* Rogers, 37 Mo. 367; *In re* O'Connor, 37 Wisc. 379. And compare cases, of double amenability to Federal and State jurisdiction for the same act, of Moore *v.* Illinois, 14 Howard, 13; *Ex parte* Robinson, 6 McLean, 355; also cases of similar amenability for contempts—as Gen. Houston's case, II Opins. At. Gen. 655; State *v.* Yancey, 1 No. Ca. Law Rep. 519.

1. III Opins. At. Gen. 460. In the case of *In re* Wall, 8 Fed. Rep., 85, a soldier was tried and sentenced by a court-martial while in the constructive custody of the U. S. District Court, under a writ of *habeas corpus;* the officer who had him in charge not thinking it worth while to inform the court-martial that the civil proceedings were pending. "This conduct," observes the District Judge, "was highly reprehensible." In Capt. Howe's case, (*ante,*) the action of the court-martial was suspended for more than two years, while the civil proceedings against the accused were pending.

2. See Chapter XVI—"Plea of Former Trial"; also Part III.

3. Constitution, Vth Amendment.

Amenability when in the U. S. Service. The Con-
ıtion, as we have seen, empowers Congress to "provide for
erning such part" of the militia "as may be employed in the
vice of the United States." The Act of Feb. 28, 1795, in
cution of this power, provided, (sec. 4,) "*that the militia em-
yed in the service of the United States shall be subject to the
ne rules and articles of war as the troops of the United States,*"
l this provision, repeated in substance in the Act of July 29,
51, is now embraced in Sec. 1644 of the Revised Statutes and
the 64th article of war. The question as to when the militia
ould be regarded as legally in the employment of the United
ıtes was, at an early period, (1820,) settled by the Supreme
urt in the leading case of Houston *v.* Moore,[1] in which, (with
erence to the war of 1812,) it was held that the mere calling
th did not constitute an employment of the militia in the public
vice, and that they did not become "so employed" until their
ival at the place of rendezvous and muster. From this point
was—as determined by the court—that their character was
nged from that of State to that of National militia, that they
re brought under the command of the President as constitu-
nal "commander-in-chief of the army and navy of the United
ıtes and of the militia of the several States when called into
actual service of the United States," and that they became
bject to the federal military code.[2]

The ruling in Houston *v.* Moore has been affirmed by sub-
quent rulings and opinions,[3] in which it is the more distinctly
d down that it is *the formal muster into the U. S. service at the
ce of rendezvous* which properly constitutes the legal evidence

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1. 5 Wheaton, 20.

2. It may here be noted that a considerable number of cases of trials
militia officers and soldiers by courts-martial during the late war are
blished in the General Orders of that period. A large proportion will
found in the Orders of the Department of the Missouri; the Gov-
or of Missouri having been specially authorized by the President, in
ember, 1861, (by G. O. 96, War Dept.,) to raise a force of State
tia to serve during the war within the State. See, for example, cases
e following Orders of Dept. of the Mo:—G. O. 31 of 1862; do. 10,
34, 94, 98, 104, 112, 141, of 1863; also G. O. 38, Dept. of the Tenn.,
4.

3. Kneedler *v.* Lane, 45 Pa. St. 238; McCall's Case, 5 Philad. 261;
im's Case, Id. 278; People *v.* Campbell, 40 N. Y. 135; Tyler *v.*
eroy, 8 Allen, 493; Story, Const. § 1213; III Opins. At. Gen. 691;
l. 14, 282.

of the commencement of the employment of this force. That the proceeding of muster-in is, regularly, the proper starting point of the service is indeed made quite apparent by the express language of the provision of the Act of July 17, 1862, now incorporated in Sec. 1648 of the Revised Statutes, that "the militia so called shall be mustered in," &c. It is therefore from the muster-in that the *amenability* under consideration properly begins.

The term of liability. The status thus initiated continues till the period of discharge. In the Act of 1861, above referred to, it was directed that the militia should serve "until discharged by proclamation of the President;" in the provision of 1862, repeated in Sec. 1648, Rev. Sts., it was declared that they should serve for a period named "unless sooner discharged by command of the President." The form of the order of discharge is not material provided it issue by the authority of the President, though communicated by a subordinate commander. Thus an order proceeding from such authority, which directed certain militia, upon being mustered and without being required to serve, to disband and return to their homes, was held by Atty. Gen. Legaré[1] "a virtual discharge from actual service." The usual mode, however, of discharging militia during the late war was similar to that pursued in the case of volunteers—a formal muster-out, accompanied by written discharges.[2]

2. Amenability for Refusing to Comply with the Call. The Act of 1795 provided that an officer or soldier of militia who should fail to obey the orders of the President calling the militia into the public service should incur a certain forfeiture and become liable to certain other punishment, "to be determined and adjudged by a court-martial." This provision, substantially repeated in the enactment of 1861, has been reproduced in Sec. 1649, Rev. Sts. The question which it suggests is—what kind of court-martial is intended, and this question has been passed upon and settled by the highest authority. In the case of Houston *v.* Moore[3] heretofore cited, it was held by the Supreme Court that, though the mere calling forth of the militia did not bring

1. III Opins. 687.
2. See Mustering Regulations in G. O. 108 of 1863.
3. 5 Wheaton, 1, 25, 64–66.

hem into the public service, or render them subject to the articles of war, a militiaman who refused to obey the call was yet guilty of a military offence against the United States, for which, under the provision of the Act of 1795, he was triable and punishable by a court-martial of the United States, composed of course of militia officers. This ruling, affirmed in Martin *v.* Mott,[1] recognizes a peculiar jurisdiction having a source quite different from that exercisable over the militia after it has become a part of the national forces. This source is found in the power of Congress to provide, not for governing the militia but for calling them forth, and in the further general power "to make all laws which shall be necessary and proper for carrying into execution" its specific powers. In asserting the authority of Congress to establish this jurisdiction by its enactment of 1795, Chief Justice Marshall, in an early case,[2] observed:—"In the execution of this power," (the power 'to provide for calling forth the militia,') "it is not doubted that Congress may provide the means of punishing those who shall fail to obey the requisitions made in pursuance of the laws, and may prescribe the mode of proceeding against such delinquents and the tribunal before which such proceedings should be had." That the exceptional jurisdiction thus created is quite other than that first above specified, and which is exercised over the militia similarly as over the Army of the United States, is illustrated by the fact, heretofore noticed, that the courts-martial, (authorized by Sec. 1649, Rev. Sts.,) for the trial of militiamen for disobeying the call, are not necessarily governed by the code of articles of war. This is indicated in Martin *v.* Mott,[3] where it was held that the matter of the composition of such courts, so far as respects the *number* of the members, was not required to be regulated by the article, (now the 75th,) on that subject. And the court say, referring to the articles in gen-

1. 12 Wheaton, 19, 34. And see Meade *v.* Depty. Marshal of Va., 1 Brock. 324; Moore *v.* Houston, 3 S. & R. 169; Com. *v.* Irish, Id. 176; Duffield *v.* Smith, Id. 590. It is to be noted that the doctrine of the U. S. Supreme Court, as stated in the text, overrules that of the Supreme Court of New York in Mills *v.* Martin, 19 Johns. 7, and Rathbun *v.* Martin, 20 Johns. 343, in which it was held that a *State* militia court was intended by sec. 5 of the Act of 1795, (R. S., Sec. 1649,) and could alone take cognizance of the offence therein contemplated, the delinquent not being subject to the articles of war.

2. Meade *v.* Depty. Marshal, 1 Brock, 326.

3. 12 Wheaton, 35.

eral,—"If any resort is to be had to them, it can only be to guide the discretion of the officer ordering the court, as matter of usage and not as matter of positive institution."

That the offence which shall subject an officer or soldier of militia to the jurisdiction under consideration must consist in a refusal or neglect to obey the order of the President, and that a refusal to obey an order emanating merely from a Governor of a State will not render the delinquent so amenable, is shown by Atty. Gen. Wirt in an early opinion.[1]

Term of the jurisdiction. It was held in Martin *v.* Mott,[2] that 'a court-martial regularly ordered for the trial of a delinquent militiaman under the Act of 1795 did not expire with the end of a war existing when it was convened, its jurisdiction to try such offence not being dependent upon the fact of war or peace.' It was added:—"It would be a straitened construction of the Act to limit the authority of the court to the mere time of the existence of the particular emergency, when it might be thereby unable to take cognizance of and decide upon a single offence. It is sufficient to say that there is no such limitation in the Act itself."

III. Marines Detached for Service with the Army.

Nature of the Jurisdiction. It is provided by Sec. 1621, Rev. Sts., that the "*marine corps, when detached for service with the army, by order of the President, * * * shall be subject to the rules and articles of war prescribed for the government of the army.*" The relation of the corps to the army, and the amenability of its officers and men to trial by courts jointly made up of regular and marine officers, are recognized in the 78th article of war, and have already been considered in the Chapter on the Composition of Courts-Martial. It need only be added that such amenability during the continuance of the detached service will be substantially of the same quality as if the offenders were members of the army proper; further, that while the jurisdiction for the trial and punishment of offences committed pending such service will most readily and appropriately be exercised before the same be terminated, it may legally be exercised within

1. I Opins. 473.
2. 12 Wheaton, 37.

reasonable period thereafter, provided it has regularly attached by the due commencement of proceedings before.

IV. Civilians Subjected to Military Discipline in Time of War.

Statutes Authorizing Jurisdiction. The class now to be considered are persons whose liability to military government and trial by court-martial arises only in time of war, and is the result solely of the exceptional relations and obligations prevailing during a state of war. The statutes by which courts-martial, which, as has been seen, receive all their jurisdiction from statute, are empowered to take cognizance of offences of civilians in time of war, are the 63d, 45th and 46th articles of war, and Sec. 1343, Rev. Sts., which is also an article of war.[1]

1. Under Art. 63. This Article, which is the most important and comprehensive of the statutes indicated, provides as follows:—"*All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.*" This provision which, with some slight modifications,[2] has come down from our original code of 1775, which derived it from a corresponding British article, has always been interpreted as subjecting the descriptions of persons specified, not only to the orders made for the government and discipline of the command to which

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1. Here may be noticed certain statutes, no longer in force—viz: the Acts of July 17, 1862, c. 200, s. 16; of July 4, 1864, c. 253, s. 6, 8; and of July 16, 1866, c. 200, s. 3—by which certain civilians, to wit, contractors for arms, munitions and supplies for the army, (and navy,) inspectors in the quartermaster department, and civil officials and agents of the Bureau for the relief of Freedmen and Refugees, were made amenable to the military jurisdiction during the period of the late war. Cases of trials, convictions, &c., by courts-martial, of army contractors for frauds, neglects, &c., are published in the following Orders: G. O. 375 of 1863; G. O. and G. C. M. O. 3, 147, 166, 181, 212, 223, 322, 345, 375, of 1864; G. C. M. O. 382 of 1865; G. O. 167, 186, Dept. of the Ohio, 1863; Do. 62, Northern Dept., 1864; Do. 46, Dept. of the Susquehanna, 1864; Do. 3, Mil. Dist. of Ky., 1865; Do. 54, Dept. of La., 1865; Do. 47 Middle Dept., 1865; Do. 19 Dept. of Tenn., 1866. And see G. C. M. O. 614 of 1865; G. O. 114, Dept. of Washington, 1865, for proceedings of trials of inspectors; and G. O. 75, Third Mil. Dist., for a case of a trial of an agent of the above-mentioned Bureau.

As to the constitutionality of this class of statutes, especially of the enactment relating to *contractors*, see *post*.

2. The principal was the omission in the code of 1874 of the mention of *sutlers*.

they may be attached, but also to trial by court-martial for violations of the military code.[1] Protected as they are by the military arm they owe to it the correlative obligation of obedience; and a due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the enemy, requires that these persons shall be governed much as are those with whom they are commorant.[2] Owing indeed to the policy of our laws relating to the army, which has aimed to impress, in general, a distinctive military character—as officers and enlisted men—upon the persons employed in the military service proper, the classes of *attachés* mentioned in the Article have been less varied and numerous in our armies than in those of foreign nations. In our late war, however, they were necessarily more considerable than at any previous period.

"Retainers to the camp." This term may be deemed to include:—1. Officers' servants; 2. Camp-followers attending the army but not in the public service. Of the former, there have been but few trials by court-martial,[3] their breaches of discipline having been in general summarily punished by expulsion from the station or beyond the lines.[4] Of followers of the camp—sutlers,[5] sutler's employees,[6] newspaper correspondents,[7] telegraph-

1. See Samuel, 691–697; Hough, 596–598; Simmons, § 71; Maltby, 31; O'Brien, 151; De Hart, 22; G. O. 175 of 1864; DIGEST, 148.

2. See the authorities cited in the last note; also Com. *v.* Gamble, 11 S. & R. 93; Foucher, Commentaire sur le Code de Justice Militaire, 177.

3. See case in G. C. M. O. 139 of 1864, of an officer's servant tried for stealing from the mail; also in Do. 29, Army of the Potomac, 1864, of one tried for selling liquor to soldiers.

4. This punishment has also been imposed, summarily as well as by sentence, upon the other classes of persons who are the subjects of the Article. See *post*.

5. See G. C. M. O. 164 of 1864; Do. 9, Army of the Potomac, 1865; G. O. 13, 132, Dept. of Washington, 1865. Sutlers were also sometimes expelled in orders without trial. See G. O. 87, Army of the Potomac, 1863; Do. 11, 21, Mountain Dept., 1862. Compare Hough, (P.) 823, as to the expulsion of sutlers from the French army in the Crimea by an order of Gen. Canrobert for selling to the soldiers "adulterated and unwholesome beverages."

6. G. O. 76, Dept. of Washington, 1865. And see G. C. M. O. 12, Army of the Potomac, 1865.

7. See cases of newspaper correspondents tried for making unauthorized publications—in G. O. 10, Dept. of Washington, 1863; Do. 29,

operators,[1] and some others,[2] were, from time to time during the late war, brought to trial by court-martial or otherwise summarily disciplined.

"Persons serving with the armies in the field." While this might perhaps be viewed as a general designation including all persons serving in the field with the army in any capacity, whether public or private, yet inasmuch as the terms "service" and "serving," as used in the Articles of war, have reference to public service—the service of soldiers and the like—it is preferred to treat these words as intended to describe civilians in the employment and service of the *government.*[3] This class, during the late war, was considerably more numerous than that of the camp-followers or private retainers. It consisted mostly of clerks, teamsters, laborers and other employees of the different staff departments, hospital officials and attendants, interpreters, guides, scouts and spies, and men employed on transports and military railroads and as telegraph operators, &c.[4] Of these persons those who appear from the General Orders to have been most frequently subjected to trial by court-martial were—Inspectors, Teamsters, and other employees of the Quartermaster's Department;[5] Officials

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Army of the Potomac, 1863; Do. 13, Dept. of the Tenn., 1863. In G. O. 39, Div. West Miss., 1864, two correspondents, of the New York Herald and Tribune respectively, were ordered to be sent beyond the lines for a similar offence. In G. O. 48, Army of the Potomac, 1863, all correspondents not complying with a certain order in regard to publications are directed to be excluded from the lines.

1. In G. C. M. O. 29, Army of the Potomac, 1864, two telegraph operators are ordered to be sent beyond the lines.

2. See a case of an employee of the U. S. Sanitary Commission sentenced to imprisonment, on conviction of selling liquor to soldiers—in G. O. 45, of 1864. That the *wife of an officer* may be triable by court-martial as a camp-follower, see Hough, (P.) 629.

3. Persons not in public employment are classed under the previous description of "retainers." See *ante.*

4. See DIGEST, 48.

5. See G. C. M. O. 392 of 1864; Do. 25, 614, 625, of 1865; G. O. 9, 64, 86, 114, Dept. of Washington, 1865; G. C. M. O. 22, 45, Army of the Potomac, 1864; Do. 4 Id., 1865; G. O. 20, Dept. of the Susquehanna, 1863; Do. 15, Dept. of Ark., 1864; Do. 17, Dist. of Oregon, 1864; Do. 53, Div. West Miss., 1864; Do. 63, Middle Dept., 1865; Do. 27, Dept. of the South, 1866; Do. 29, Dept. of La., 1866; Do. 15, Second Mil. Dist., 1868; Do. 2, 5, 65, Dept. of the Platte, 1869; G. C. M. O. 45, Dept. of the Mo., 1868. And see, generally, G. O. 75, War Dept., 1864.

and employees of the Provost Marshal General's Department,[1] Contract surgeons and nurses,[2] Paymasters' clerks,[3] Officials of boards of enrolment,[4] Officers and men employed on steam transports,[5] Military telegraph operators,[6] &c.[7]

The Article to be strictly construed. This Article, in creating an exceptional jurisdiction over civilians, is to be strictly construed and confined to the classes specified.[8] As held by the Judge Advocate General,[9] the mere fact of employment by the Government within the theatre of war does not bring the person within the application of the statute. In several cases of public

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1. G. O. 353 of 1863; Do. 33, 43, and G. C. M. O. 271 of 1864; G. O. 60, Northern Dept., 1864; Do. 105, 199, Dept. of the Mo., 1864; Do. 27, Dept. of the East, 1865; Do. 62, Dept. of Pa., 1865.

2. G. C. M. O. 373 of 1864; G. O. 58, Northern Dept., 1864; Do. 81, Dept. of Pa., 1864; Do. 163, Dept. of Washington, 1865.

3. G. O. 294 of 1863; Do. 72, Dept. of the Ohio, 1864; Do. 5, Dept. of West Va., 1864.

4. G. C. M. O. 388, of 1864; Do. 1, 59, 386, of 1865.

5. G. O. 7, 9, Dept. of Ohio, 1863; Do. 126, Dept. of the South, 1864; Do. 88, Div. West Miss., 1864; G. C. M. O. 26, Army of the Potomac, 1864; G. O. 40, Dept. of La., 1865.

6. G. C. M. O. 29, Army of the Potomac, 1864; G. O. 109, Dept. of the Ohio, 1864; Do. 19, Div. West Miss., 1865.

7. See cases of trials of employees of the subsistence, engineer and ordnance departments in G. C. M. O. 39 of 1865; G. O. 9, 24, 153, Dept. of Washington, 1865; Do. 25, Dept. of the Tenn., 1866; of an ambulance driver in G. C. M. O. 161, War Dept., 1864; an agent of the Freedmen's Bureau in G. O. 75, Third Mil. Dist., 1867; a veterinary surgeon in G. O. 36, Dept. of La., 1866; a scout in G. O. 19, Div. West Miss., 1865; and of persons styled, generally, "Government employees" in G. C. M. O. 25 of 1865; Do. 22, Dept. of Ky., 1865; G. O. 118, Dept. of Washington, 1865; Do. 16, Dept. of Ark., 1865; Do. 23, Dept. of Tenn., 1866; Do. 68, Dept. of the Mo., 1866.

8. As to the limits of the military jurisdiction exercisable under the *British* law over a similar class of persons, Clode, M. L., 95, well says:—"From what has been already written the reader perhaps need not be cautioned against supposing that all those who are resident or commorant within the Camp or Barrack are thereby rendered liable to trial by court-martial. Such a liability must be found upon the statute book in plain and explicit words leaving nothing to inference." And he adds, from the ruling of Chief Justice Best, in Looker *v.* Halcomb, 4 Bing. 189, that—"Any statute which takes away the right of trial by jury and abridges the liberty of the subject must receive the strictest construction," so that "nothing should be holden to come under its operation that is not expressly within the letter and spirit of the Act."

9. DIGEST, 48.

employees brought to trial by court-martial during the late war the convictions were disapproved on the ground that it did not appear that at the time of their offences they were '*serving with the army*' in the sense of this Article.[1]

Limits of its operation—Application to Indian wars. Further, the use of the terms—"to the camp," "in the field," "according to the rules and discipline of war," is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of the war.[2] A period of hostilities with Indians is, equally with a period of warfare against a foreign power, a "time of war;"[3] and it has been specifically held by the Attorney General that civil employees of the War Department "serving with the army in the Indian country during offensive or defensive operations against the Indians" are amenable to military trial for offences committed pending such service.[4] In cases indeed of offences alleged to have been committed during hostilities against *Indians*, it may not always readily be determined whether a *war* was in a proper sense pending at the date of the offence, or whether the *locus* of the offence was, properly speaking, the theatre of such a war.[5] In a case of a quartermaster's clerk arrested, upon a charge of fraud against the Government, while serving at a post in the proximity of an Indian Agency, and of a band of Indians a portion of whom had previously been hostile but with whom no hostilities whatever were at the time

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1. See instances in G. O. 9, Army of the Potomac, 1863; Do. 132, 153, Dept. of Washington, 1865; Do. 40, Dept. of La., 1865; G. C. M. O. 22, Dept. of Ky., 1865. Similarly, in a case adjudicated during the same period, it was held that an agent of the Confederate Treasury Dept., though acting upon the scene of hostilities, was not a 'person serving with the army' or subject to military trial; and he was accordingly released, upon *habeas corpus*, from military custody, after having been tried, convicted, and sentenced to death, by a court-martial. Confederate States *ex rel.* McKee *v.* Scully *et al.*, Sup. Ct., Confed. States, Sept., 1864. And see, as to the general principle involved, Antrim's Case, 5 Philad. 288.

2. In XIV Opins., 22, it is remarked by the Atty. Gen. that "the words '*in the field*' imply military operations with a view to an enemy."

3. XIII Opins. At. Gen. 31, 470.

4. XIV Opins. 22.

5. Note the situation as described in XIV Opins. At. Gen. 23, and lso in XIII Id. 472.

pending, it was held by the Judge Advocate General[1] that the circumstances were not within the description or application of the Article, and this opinion was concurred in by the Attorney General.[2] In general indeed, the jurisdiction created by the Article should be extended with special caution over civilians serving with troops during an *Indian* war, for the reason that the theatre of such a war is commonly restricted in extent and that its duration is but brief as compared with other wars.[3]

Application to clerks of War Department, and the like, in time of peace. In view of the fact that this Article is operative only in and for a time of war, it need hardly be remarked that the mere fact that a civilian is serving, in time of *peace*, in connection with the military administration of the government,—as where he is a clerk of the War Department, or at a Military Division or Department headquarters,—will not be sufficient to subject him to military trial for offences committed during such service. This point was so held in 1877 by the Judge Advocate General in the case of Barth, a clerk in the office of the Chief Quartermaster Military Division of the Pacific, and, further, with regard to the Superintendents of National Cemeteries who are discharged soldiers and civilians.[4] In both cases the ruling was concurred in by the Attorney General.[5]

Term of the jurisdiction. It need only be added that the jurisdiction authorized by Art. 63 should properly be exercised,

1. DIGEST, 50.
2. XVI Opins. 48.
3. See Digest, 49.
4. DIGEST, 49, 50.
5. XVI Opins. 13. And see his later opinion in Craft's case, Id. 48.

The only case *contra* is that of John Thomas, (1 Chicago Legal News, 245,) a civilian clerk of an army paymaster in Mississippi in 1867, who was held by the U. S. Dist. Judge to be amenable to military trial for a fraud upon the United States. But this conclusion was determined by the fact that the State was then under military government, it not having yet been authoritatively decided by the Supreme Court that the war was legally ended. It may be noted in this connection that the rulings to the effect that *naval* paymasters' clerks are amenable to trial by court-martial, (U. S. *v.* Bogart, 3 Benedict, 257; *In re* Bogart, 2 Sawyer, 396; *Ex parte* Reed, 100 U. S. 13,) are based upon the conclusion that these clerks are *officers of the navy*. The clerks of *army* paymasters, like all the other clerks connected with the *military* department of the government, are *civil* officials merely.

or at least initiated, during the *status belli.* Upon a declaration of peace, or other legal termination of hostilities, the Article is no longer operative, and the "discipline of war" cannot lawfully be applied thereunder.[1]

Arts. 45 and 46. These provisions of the Code declare that—"*Whosoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy;*" and "*Whosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly—shall suffer death or such other punishment as a court-martial shall direct.*"

Construction as to application to civilians. Whether the word "*whosoever*" is here employed in a general sense, and includes civil equally with military persons, is a question frequently discussed in cases arising during the late war, but which must be regarded as determined by the weight of reason and authority in the affirmative. The principal grounds for such determination may be stated as follows:—

1st. While all the other articles of the Code by which specific offences are denounced are so expressed as to apply *in terms* to military persons—as by the words "any officer who," "any soldier who," "any officer or soldier who," and the like, the persons to be affected by Arts. 45 and 46 are designated by a general and comprehensive term of description which may include persons without as well as within the army.

2d. In the only other case in which the word "whosoever" is employed, that of Art. 57, the same is qualified by the addition—"belonging to the armies of the United States." A similar qualification is perceived in Art. 44 which begins—"Any person belonging to the armies of the United States who," &c. It is a fair inference that where the qualification is absent the general term is intended to be unqualified.

3d. In their original form in the code of 1775, these Articles were phrased—"Whosoever belonging to the continental army," &c., a limitation taken from the corresponding British articles, then existing, which commenced—"Any officer or soldier who," &c. In the "additions" to this code, of November, 1775, was contained an article substantially identical with the second of the

1. See DIGEST, 49, 333. And compare V Opins. At. Gen. 58; XIV Id. 253.

original articles, but substituting for the description there ployed the general term—"All persons." In the code of 1 the description in *each* of the original articles was change "Whosoever," a form retained without variation to the pre time; the articles in other respects also remaining without stantial modification. It is a reasonable argument that, in al doning the words of limitation first employed, it was intende Congress that these statutes should not be restricted in t application to members of the army.

4th. The contemporaneous construction of the articles as pressed in the code of 1776 appears to have been that they app to cases of civilians. Thus, in May, 1777, a case of one J Brown, a civilian, convicted by a general court-martial of co sponding with the enemy in violation of art. 19, sec. 13, of 1 (the present 46th Art.,) was reported to Congress and recorde its journals.[1] Subsequently, by Resolution of Oct. 8, 1777 was declared by Congress that "any person" who should guilty of giving intelligence or aid to the enemy should him be "considered and treated as an enemy and traitor to t United States," and be triable by court-martial and subject to death penalty or such other punishment as the court might t proper. This enactment was practically but a reiteration of existing articles of war, while at the same time extending t application to certain forms of relieving and assisting the en not therein enumerated.

5th. That these Articles, upon their re-enactment, after adoption of the Constitution, in the code of 1806, were simil construed, appears from the military Orders for the "Arm West Lake Champlain," dated in 1813, in which the two art are published for the information and warning of the civil munity, as being "equally binding on the citizen as the soldi In 1818, R. C. Ambrister, a civilian, was convicted by a c martial convened by General, afterwards President, Jackson whom also the finding and sentence were approved,) of ai the enemy by "supplying them with the means of war,"[3]

1. 2 Journals, 135.

2. 2 Journals, 281. See, with this, the Resolution. *in pari mater* Feby. 1778—2 Journals, 459—under which Joshua Hett Smith, t leged confederate of Arnold and André, was brought to trial by c martial in 1780. 2 Chandler, Crim. Trials, 185.

3. Trial of Arbuthnot and Ambrister, London, 1819; Am. Papers, Mil. Affairs, vol. 1, pp. 721–734.

)f the earlier writers on military law, while Maltby[1] was of)pinion that the articles under consideration applied only to nilitary persons, O'Brien[2] held that they were equally applicable o persons "in civil life."

6th. Coming to the period of the late war—the view was ex- ressed at an early date by Judge Advocate General Holt that ivil persons were included within the general description of the wo articles and amenable to trial thereunder.[3] This view was dopted by the Secretary of War, and announced in Orders of the War Department[4] and of the military commands;[5] and, between 863 and 1865, civilians charged with a violation of one or both of the articles were frequently brought to trial by courts-martial; heir sentences, when convicted, being generally approved and xecuted.[6]

7th. The practice during the war seems to have settled the uestion in the executive department. In July, 1871, the pre- ailing construction was recognized and adopted by the Attorney General, who held that certain civilians, apprehended in New Mexico for supplying ammunition to Indians at war with the United States, were amenable to trial under the 56th (now 45th) rticle, which, he observed, applied to "persons who are not as well as persons who are in the military service."[7] This is the

1. Pages 37–40.
2. Page 147.
3. DIGEST, 20. And see Ives, 63.
4. See G. O. 67, War Dept., 1861, in which it is declared that all ersons guilty of any unauthorized correspondence or communication y which intelligence may be conveyed to the enemy "will be proceeded gainst under the 57th (now 46th) Article of war."
5. In G. O. 24, Dept. of the Ohio, 1863, Gen. Wright, in calling at- ention specifically to the two articles, enjoins it upon all military offi- ers in the Department "to arrest all persons guilty of their violation, ithout regard to age, sex, or condition, and submit proper charges gainst such offenders that they may be brought before a court-martial r trial." And see G. O. 80, Div. West Miss., 1864; also Orders cited n next note.
6. See G. O. 76, 175, 250, 371, War Dept., 1863; Do. 51, Id., 1864; . C. M. O. 106, 157, Id., 1864; Do. 260, 671, Id., 1865; G. O. 10,)ept. of Washington, 1863; Do. 52, Dept. of the Ohio, 1863; Do. 31, liddle Dept., 1863; Do. 13, Dept. of the Tenn., 1863; Do. 39, 58,)ept. of the Mo., 1863; Do. 190, 203, Id., 1864; Do. 31 Id., 1865; o. 176, 181, Dept. of the Gulf, 1864; Do. 11, 19, 67, Id., 1865; Do. 3, 88, Div. West Miss., 1864; Do. 14, 27, Id., 1865; Do. 54, Dept. of e East, 1865.
7. XIII Opins. 472. What is said under Art. 63, (see *ante*,) as to applicability to an Indian as well as to a foreign war, is equally ap- osite here.

most recent authoritative ruling upon the question of jurisdiction under consideration.

8th. It is, lastly, a just argument in favor of the view that by the term "whosoever" it was intended to embrace non-military persons, that it is not in fact members of the army but civilians—disaffected or mercenary—who would be the most likely to indulge in the practices denounced by these Articles.

Limits of the jurisdiction. Accepting as correct in general the construction which has been put upon the two Articles by the mass of authority cited, it remains to repeat that these are statutes operative only in war, and to remark that the military jurisdiction extended over *civilians* by the same, (as by the other statutes of the general class under consideration,) must be understood to be limited to acts committed on the theatre of war or within the scope of martial law. This point, in substance so ruled by Chief Justice Kent in the early case of Smith *v.* Shaw,[1] has been more recently most clearly held in Jones *v.* Seward,[2] a leading case of a suit instituted against the Secretary of State during the late war. The same principle is in effect asserted by the U. S. Supreme Court in *Ex parte* Milligan.[3]

Term of the jurisdiction. It may further be remarked that this special jurisdiction, like that authorized by Art. 63 or any other growing out of a condition of war, should properly be exercised during the continuance of the war status.[4]

The jurisdiction not exclusive. It may be added with reference to this jurisdiction that it is not exclusive. The acts denounced in the Articles are mostly acts of treason, and as such cognizable by the U. S. Circuit Court.[5]

Sec. 1343, Rev. Sts.—Jurisdiction over Spies. This jurisdiction will be more appropriately considered in Chapter

1. 12 Johns. 257, 265. And see in the matter of Stacy, 10 Id. 332; Mills *v.* Martin, 19 Id. 22; *In re* Kemp, 16 Wis. 359.
2. 40 Barb. 563.
3. 4 Wallace, 121–3.
4. See DIGEST, 49, 333, and other authorities cited under ART. 63 *ante*.
5. That giving intelligence to the enemy, and supplying the enemy with arms, munitions, provisions or money, are overt acts of treason indictable in the U. S. Courts, see Chapter XXV—FORTY-FIFTH and FORTY-SIXTH ARTICLES, and authorities cited in notes.

XXV; the statute providing for the trial and punishment of spies being properly an Article of War.

V. Certain other Civilians made Amenable by Law to the Military Jurisdiction.

The Classes of Persons and the Statutes making them Amenable. Besides the classes of civilians last considered, as subjected by statute to the jurisdiction of courts-martial *in time of war*, the existing law makes similarly amenable certain other civilians, generally—*i. e.* without regard to the prevalence of a state of war, or equally in peace and war. These latter, who have already been referred to, in this Chapter, under the head of 'Exceptions to the General Rule of Non-amenability after discharge, &c.,' are the following:

(1.) Officers and soldiers retained under military jurisdiction, after discharge, &c., by the last clause of the 60th article of war, providing for the punishment of frauds against the United States, &c.: (2.) Officers accorded a trial by general court-martial, after being summarily dismissed, by Sec. 1230, Rev. Sts.: (3.) Soldiers sentenced to dishonorable discharge and confinement, and, after discharge, held in confinement at the Military Prison at Leavenworth, who are made liable to military trial for offences committed during confinement as being within the terms of Sec. 1361, Rev. Sts.: (4.) Discharged soldiers of the regular army who are inmates of the Soldiers' Home, and as such made subject to the rules and articles of war by Sec. 4824, Rev. Sts.: (5.) Discharged officers and soldiers of volunteers, who, as inmates of the National Home for Disabled Volunteer Soldiers, are made similarly subject by Sec. 4835, Rev. Sts.

General Principle of Non-Amenability of Civilians to the Military Jurisdiction in Time of Peace. All persons of these several classes are *civilians*, by reason of their legal discharge or dismissal from the military service. That a civilian, entitled as he is to trial by jury, cannot legally be made liable to the military law and jurisdiction, in time of peace, is a fundamental principle of our public law,[1] and it is quite probable that

1. See *Ex parte* Milligan, 4 Wallace, 121, 123; Jones *v.* Seward, 40 Barb., 563; In matter of Martin, 45 Id. 145; Smith *v.* Shaw, 12 Johns. 257, 265; In matter of Stacy, 10 Id. 332; Mills *v.* Martin, 19 Id. 22;

Congress did not contemplate in these enactments any material departure from this principle. The provision of Art. 60 and that of March 3, 1865, incorporated in Sec. 1230, Rev. Sts., were war measures, intended apparently to be but temporary in their operation, and which have indeed been but rarely availed of in practice.[1] As to Sec. 1361, it may well have been framed without a consideration of the fact that it was expressed in such general terms as to include prisoners who had been discharged as well as those still in the service. Sec. 4824 was probably added simply or mainly *in terrorem:* no court-martial is known to have ever been convened under it. Sec. 4835 is a copy of the last, and as authority for trials by court-martial has proved wholly unavailable.[2]

Constitutionality of the Statutes. These laws, however, remain on the statute book, and under Sec. 1361 discharged soldiers are not unfrequently brought to trial,[3] while under Art. 60 discharged officers and soldiers are always liable to be tried. It is proper therefore to consider the question of the constitutionality of such laws, and that they are constitutional it is difficult to be assured. They are certainly not so as being forms of exercise of the power to 'govern and regulate the land forces,' because the term "land forces" does not embrace discharged officers and soldiers or any other civilians. They must be so therefore under and by virtue of a combination of the *two* powers, to 'raise armies' and 'govern the land forces.' That is to say, they must be regarded as placing or retaining these persons, notwithstanding that they have become civilians, in the army for a temporary or special purpose, and, by the same act, providing for

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Johnson v. Jones, 44 Ills. 142, 155; Griffin v. Wilcox, 21 Ind. 386; [illegible] Kemp, 16 Wis. 350; *Ex parte* McRoberts, 16 Iowa, 605; Antrim's Case, 5 Philad. 278; *Ex parte* Merryman, Taney, 246; *Ex parte* Henderson, U. S. Circ. Ct., Dist. of Ky., 1866; Parker v. Ld. Clive, 4 Bur. [illegible]; Rawle on Const. [illegible]; III Opins. At. Gen., 690; V Id., 736; XIII Id., [illegible]; XVI Id., 13 [illegible]; Maltby, 37; G. C. M. O. 16 of 1871.

1. See cases under Art. 60 in note [illegible]. As to cases under Sec. 1230, see Chapter VI, where this statute is considered with reference to the authority of the President to convene courts-martial under it.

2. A remarkable instance of a [illegible] court ordered under this section, in [illegible] and which well illustrates the incongruity of such proceedings, [illegible]

3. See recent instances in note under the previous reference to this Section in the present Chapter.

their government while so placed or retained, so that their offences shall be punishable as "*cases arising in the land forces.*"[1] But does the power to 'raise armies' extend to the inclusion of such civilians in the land forces? What are "armies" in the sense in which this term is used in the Constitution? Its interpretation is to be found in the series of statutes dating from the period of the adoption of that instrument, and of which the constitutionality has not been questioned, by which the constituents of our armies or Army have been repeatedly defined. These constituents are a certain number of officers commissioned or appointed, and of soldiers enlisted, into the military service as such, bound to obey military orders and to perform military duty in peace or war, entitled to military pay, and remaining under military discipline and government till discharged in due form, or otherwise legally separated from the military state. Such are the "armies" or "land forces" which the Constitution authorizes Congress to raise, support and govern. Can this authority be held to include the raising or constituting, and the governing *nolens volens*, in time of *peace*, as a part of the army, of a class of persons who are under no contract for military service, but on the contrary have been formally discharged from all such contract, who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity except the special one for which the statutes under consideration propose to reserve them? In the opinion of the author it may well be questioned whether this is not beyond the power of Congress under the provisions of the Constitution referred to. That instrument, in a further provision also,—the Vth Amendment,—clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations—and it is difficult to perceive how Congress can create such a class, without a disregard of the letter and spirit of the organic law.

In 1866, the Circuit Court of the United States for the District of Kentucky[2] passed upon the constitutionality of the section of

1. Compare the reasoning in Wildman's Case, DIGEST, 213, note; XVI Opins. At. Gen., 294–5.

2. In the case of *Ex parte* Isham Henderson, on *habeas corpus*.

the Act of Congress (no longer in force,) of July, 1862, which, in subjecting contractors for supplies for the army and navy to trial by court-martial for certain misconduct, provided in express terms that they should be 'deemed and taken to be a part of the land forces or naval forces for which they contracted to furnish the supplies.' This statute the court, in an elaborate opinion, pronounced unconstitutional, holding that Congress could not "by its mere declaration" place or include civilians in the army, and that the provision cited was "idle and nugatory;" and it was well observed that if Congress could so dispose of one class of civilians, it could of another, or of all classes, and thus establish a "military despotism."

As to the particular existing statutes under consideration, however, the present weight of authority is in favor of their constitutionality. In the U. S. Circuit Court for the Dist. of California,[1] the concluding clause of Art. 63 has been viewed as constitutional, and a similar view has been taken of Sec. 1361, Rev. Sts., as including prisoners who have been discharged as soldiers, by the U. S. Dist. Court for the Dist. of Kansas[2] and by the Attorney General.[3] Such opinions, whether or not satisfactory to the student,[4] are to be deferred to till the question involved shall come to be passed upon, and otherwise determined, by the Supreme Court. Meanwhile of course these statutes cannot properly be treated as other than operative and valid either by military courts or commanders, and pleas to the jurisdiction, based upon their alleged unconstitutionality, will properly be overruled.

The Case of "Traders." It remains to notice under the present head, the case of "traders," or "post traders," as to the point of their amenability to trial by court-martial. This class, which, since 1867, has superseded that of the sutlers formerly authorized, is placed by Sec. 1113, Rev. Sts., "under protection and control as camp-followers," and, by the subsequent legislation

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1 In the case of *In re* Bogart, 2 Sawyer, 406.

2 In *re parte* Wildman—Foster J. See DIGEST, 212–213, note.

3 XVI Opins., 292.

4 Neither the opinion of Judge Sawyer nor that of Judge Foster is of a positive character, and neither furnishes a definition of the terms "armies" or "land forces," as employed in the Constitution. A similar omission characterizes the opinion of the Attorney General, who also fails to distinguish between the amenability of civilians to the military jurisdiction in war and a similar amenability in time of peace.

of July 24, 1876, is made "subject in all respects to the rules and regulations for the army."[1] There can properly be no camp-followers except in time of war, and at such a time a trader pursuing his business with troops in the field would no doubt be amenable to military discipline and justice under the 63d article of war, quite irrespective of the first of the above statutes. The later statute does not subject him to the "rules and articles of war," but to the rules and *regulations* for the army—a term which in the case of civilians must be strictly construed, and should therefore be regarded as meaning no more than the Army Regulations. Thus while a trader, who is no part of the army, may, in war, like any other retainer or follower of a camp, become liable to be tried by court-martial for an offence against military discipline, he cannot be made so liable in time of peace. *Then*, while he is required to observe such of the existing army regulations as may apply to him, the jurisdiction of a military court can be extended to him no more than to any other civilian not brought within it by express statute.[2]

IV. THE OFFENCES WHICH THE JURISDICTION EMBRACES.

The offences cognizable by general courts-martial are those made so cognizable either by the Articles of war or by other statutes.

I. The Offences Cognizable under the Articles of War.

Specific and General Offences. The offences of which mention is made in the code of Articles may be divided—First, into those which are distinguished by specific names and those which are designated under a general description. The former are those made punishable in all the articles which provide for the punishment of offences except the 61st and the 62d: the latter are those included within the general terms of these two

1. For the legislation in regard to traders, see more fully in Digest, 382–3.

2. See the statement of the law, by the author, in Digest, 384. No trial of a trader by court-martial has ever been had or ordered. For misconduct, the appointment of a trader may of course be cancelled by the Secretary of War, and it has been held by the Attorney General that the appointment of another person as trader for the same post will operate as such a cancelling. Opinion of July 26, 1882. For other rulings as to traders, see Digest, 383–387.

articles. But these general terms include more particular for and phases of misconduct than are contained in all the otl articles combined, comprehending as they do all the dishon able or disgraceful acts compromising their military relations which officers may be guilty, and all the crimes other than capit neglects, violations of army regulations and disorders, of whatev nature, not enumerated in the specific articles, which may l committed either by officers or soldiers, and which are direct prejudicial to the order and discipline of the service.

Two Kinds of Specific Offences. Further, the specif military offences may be divided into those which are purel military and those which are also crimes at the civil law. Th former are those designated in all the specific articles except th 58th and 60th; the latter are those enumerated in these two a ticles.[1] The former are desertion, absence without leave, mutin disobedience of orders, disrespectful conduct to a superior, fal muster, sleeping on post, drunkenness on duty, cowardice, pi laging, &c.; the latter are the larceny and crimes accompani with violence recited in Art. 58, and the frauds, embezzlement &c., described in Art. 60. But in regard to these two forms offences it is to be observed that all are criminal and all mil tary;—criminal because the jurisdiction of courts-martial is crin inal only; military because all offences of officers and soldie cognizable by courts-martial are necessarily military offence But though all are both military and criminal, there is the di tinction between them that, of the purely military offences tl jurisdiction of the court-martial is *exclusive*, while of the othe this jurisdiction, except sometimes in war, in a region und martial law or military government,[2] is *concurrent* with that the civil tribunals.

Further Division of the Specific Offences. Specif offences may also be divided into those which are peculiar to, made punishable in, a time of war, and those which may be co

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1 With these two articles, there might, though less obviously, classed Arts. 26 and 27 which relate to the sending and accepting challenges, acting as second, &c.,—offences generally punishable the criminal codes of the States; and Arts. 45 and 46 which relate to t relieving and aiding of the enemy in various forms, some of whi certainly, as heretofore remarked, would be indictable as treasons.

2 See Coleman v. Tennessee, 97 U. S. 515, 516.

mitted and punished at any time whether of war or peace. Of the former are those indicated in Arts. 9, 43, 45, 46, 57 and 58, and most of those specified in Art. 42: that described in Art. 44 is also properly a war offence. Of the latter are all the other offences set forth in the code.

No Common-law Grades of Offences or Offenders. It is further to be said of the offences which are the subjects of the articles of war that there is no distinction between them of "felony" and "misdemeanor."[1] None of them are felonies and none of them are misdemeanors at military law, but all are simply military crimes.[2] So, among offenders, the articles recognize no principals, and no accessories either before or after the fact, *as such*.[3] The grades of crimes and of participators in crime, familiar to the common law, are unknown to the law military, and the embarrassing technicalities which have grown out of the division of crimes into principal and accessorial are wholly foreign to the procedure of courts-martial. In the military practice all accused persons are treated as independent offenders. Even though they may be *jointly* charged and tried, as for participation in a mutiny for example, and each may be guilty of a distinct measure of criminality calling for a distinct punishment, yet all are principals in law.

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1. The term *felony*, which originally at common law signified a crime entailing a forfeiture of land or goods, is now generally employed in this country to indicate an offence punishable either by death or by imprisonment in a penitentiary. A misdemeanor is "any crime less than a felony." 1 Rus. Cr. 45. The old common law division was into treasons, felonies and misdemeanors. 3 Greenl. Ev. § 1; 1 Bish., C. L. § 608.

2. The offences designated in Art. 58 are indeed, *as civil crimes*, some of them felonies and some of them misdemeanors at common law. But as here made cognizable and punishable by court-martial, *viz.* "when committed by persons in the military service," they are military crimes, and no disability or other penal consequence of a conviction of a *felony* can, in the absence of any statute imposing the same, result from a conviction of any one of them. See DIGEST, 334.

3. See Kennedy, 188, 190. In the only instance in our code where any apparent allusion is made to the distinction between principal and accessory, occasion is taken to discard it. This is in the 27th article, where it is expressly provided that "all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals and punished accordingly." In several of the articles, as the 37th, 42d, 43d, 51st and 60th, offences in the nature of those of accessories are made punishable, but always as distinct and independent acts.

No Statutory Grades or Degrees of Offences. Nor there any *statutory* grades of military offences. There are grades, for example, of mutiny, desertion, cowardice, or o purely military offence, though the instances of such offe may differ greatly in criminality and may call for very diffe measures of punishment. So, as to the offences made punish in time of war by Art. 58—the statutory military law recogn no such distinction in larceny as *grand* or *petit*, nor any *deg* in murder, manslaughter, &c., such as are known to the law most of the States.[1]

Minor Included Offences. By this term is intended lesser acts of offence which may be included in the spe offences with which military persons may be charged. ' principal of these are absence without leave, manslaughter larceny, as offences included in desertion, murder and robb A further offence of this nature is the "conduct to the preju of good order and military discipline" which may be deeme be involved in every specific military crime. The subject of s inclusion will be further considered in the Chapter on the F ing; it is here adverted to for the reason that the legality of finding of a lesser offence results from the fact that the cour trying the crime charged, has *jurisdiction* of any minor crim act recognized as an offence by law, which it contains or invol

Separate Consideration of Military Offences. The ous offences made cognizable by court-martial by the Articl war will be specifically defined and considered in Chapter X

II. OFFENCES COGNIZABLE UNDER OTHER STATUTES.

There remain a few statutes not included with the Articl war, and mostly of a more recent date, by which military pe are made amenable to trial by court-martial for offences additi to those designated in the code. These statutes are:—Secs. and 1360, Rev. Sts., by which officers and soldiers are mad

1. In a few cases the *military commissions* established by the R struction Acts, in deference to the procedure under the State law, persons charged with Murder, guilty of the same in the *second de* G. O. 107, 153, Fifth Mil. Dist., 1869; Do. 53, 62, Id., 1870. But were here acting as *substitutes for the State Courts*. (See PART II

2. See Dynes *v.* Hoover, 20 Howard, 82.

amenable for the offences of allowing or aiding convicts to escape or attempt to escape from the Fort Leavenworth Military Prison; Secs. 5306 and 5313, Rev. Sts., in which trading with an enemy without a license, dealing in captured property, &c., with certain other acts of falsity and fraud, are, in cases of military offenders, made cognizable by court-martial—legislation evidently intended to be operative only or mainly in time of war; and the Act of May 11, 1880, by which it is declared that any officer of the army, Indian agent, &c., who, without authority from the President, shall permit any Indian on a reservation to go into the State of Texas, "shall be dismissed from the public service"—in the case of an army officer, it is presumed, upon conviction by court-martial. These statutes are all of secondary importance and limited application, and, except under the first two sections mentioned, cases will rarely if ever arise in the service.

CHAPTER IX.

THE PROCEDURE OF GENERAL COURTS-MARTIAL.

I. THE ARREST OF THE ACCUSED.

We come now to the extended subject of the Procedu General Courts; and this subject will be presented in sep Chapters, under the following heads:—I. The Arrest of th cused; II. The Charge; III. The formal Ordering, Meeting, of the Court; IV. The province and duties of the President Members; V. The Judge Advocate; VI. Challenges; VII. O ization, Arraignment, &c.; VIII. Pleas and Motions; IX. Trial; X. The Evidence; XI. The Finding; XII. Sentenc Punishment; XIII. The Record.

THE ARREST.

Before a court-martial is assembled for the trial of an o or soldier charged with a military offence, the accused is narily and regularly placed in arrest. This personal attachr or taking of the body into the possession of the law, is, ir military, as in the general criminal procedure, the usual, (th not invariable,) preliminary to a bringing to justice o: offender.[1]

The subject of Arrest is regulated in part by the Articl war, (Arts. 65 to 71 and Art. 24,) and the Army Regulat (Pars. 173, 864–871,) and in part by military usage. It wi considered under the two heads of—I. Arrest of officer: Arrest of enlisted men.[2]

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1. Samuel, 639; Clode, 1 M. F., 169; Id., M. L., 10; Manual,

2. In a strict sense the term *arrest* applies only to officers, the into military custody of soldiers being more accurately expres *confinement*. Manual, 28. Our Art. 70, however, employs the "arrest" in reference to soldiers as well as officers, and it has found more convenient to use it in the text as a general rather specific description.

I. ARREST OF OFFICERS.

Occasion and Ground for the Arrest. It is declared by par. 865, Army Regulations:—"Officers are not to be put in arrest for light offences. For these the censure of the commanding officer will, in most cases, answer the purposes of discipline." Where, however, the offence is such as to call for trial and punishment, the strict course to be pursued is prescribed in the 65th Article of war, as follows:—"*Officers charged with crime shall be arrested and confined in their barracks, quarters, or tents, and deprived of their swords by the commanding officer.*"

The term "*crime*," as here used, is to be construed not as meaning civil crimes only, but as employed in a general sense and including *all military offences*, whether those purely military, or those which, while cognizable in their civil aspect by the ordinary criminal courts, are also in their military aspect cognizable by court-martial under Arts. 58, 60 and 62.[1] The context of the code from Art. 65 to Art. 71 favors this construction, which is also that sustained by the practice of the service; officers being, in the discretion of the commander, closely confined for aggravated military offences of whatever description. The corresponding article of the late British code was similarly interpreted by the authorities.[2]

The occasion and authority for the arrest of an officer thus is that he shall be charged with a material military offence.[3] By this, however, it is not intended that formal charges shall as yet have been served, or even preferred. It is sufficient that knowledge of the offence be had by the officer making the arrest because of its having been committed in his presence, or, where this is not the case, that a charge be seriously made, orally or in writing, by a responsible person and communicated to such officer. In many cases indeed—and this is the better course where practicable—a copy of the charges as preferred is served upon the officer at the time of the arrest. An officer, however, is *not entitled to know forthwith* why he is placed in arrest, and, provided the charges are served upon him within eight days, according to

1. See DIGEST, 50. And compare construction of Art. 66, *post.*

2. Wolton *v.* Gavin, 16 Ad. & El. 66; Simmons § 360.

3. An officer cannot properly resort to an arrest of another officer in order to anticipate and prevent his own arrest by the latter. See case of Col. J. L. Smith, 3d Infy., in G. O. of Dec. 19, 1820.

the provisions of Art. 71, he can claim no relief on account of the delay.

Form of the Arrest—*The order.* In lieu of the warrant or other process of the general criminal law, a military arrest is, by the usage of the service, regularly imposed by an *order*, and this order may be either verbal or written.[1] An order in writing, as being more formal and better evidencing the action taken, is the preferable mode, and that commonly adopted, except where, the offence being committed in the presence of the commander, the arrest is ordered by him on the spot. The order of arrest, especially where in writing, is usually given through the adjutant or other staff officer.[2] This official does not ordinarily serve the order by copy, making return upon the original in the manner of a writ,[3] but simply delivers to the accused an original, of which a copy is retained or a record made at the headquarters.

There is no prescribed form of expressing the order of arrest. A simple and usual form is a direction to the officer that he 'will consider himself in arrest,' or 'consider himself in arrest and confine himself to his quarters,'[4] till further orders.[5] A requirement that he surrender his sword is sometimes added, but is not essential, the Article itself specifically providing for such surrender.

The confinement. Art. 65 requires that the arrested officer shall be "confined to his quarters," &c., and an officer, upon arrest, will properly betake and confine himself to his quarters without being specifically directed to do so.[6] The quarters of an

1. That a verbal is equally efficacious with a written order, see Hough, 493; Id., (P.) 22; Griffiths, 24; De Hart, 75; Benét, 47.

2. "An officer is put in arrest, either directly by the officer who orders it, or, more generally, by the ministration of a staff officer." Simmons §353; Manual, 28. Simmons adds:—"Arrests have occasionally been imposed by the intervention of the provost marshal, and, more rarely, notified even in public orders."

3. As is sometimes done in the *militia* service, where the procedure is in all respects more nearly assimilated to that of the State courts. See Maltby, 128.

4. But that the direction as to *confinement* is not necessary, being included in the simple order of *arrest*, see *post*.

5. An officer when duly placed in arrest cannot refuse to so "consider himself." As remarked by Gorham, (p. 27.) "he is under arrest whether he acknowledges it or not."

6. Unless indeed larger limits are specifically assigned him in the order of arrest. See *post*.

officer are his military residence, whether consisting of a tent or tents, a barrack, a separate tenement assigned to him at a post, or a house or rooms occupied by him at a station where public quarters are not furnished by the government. The limits of such quarters he cannot, of his own authority, exceed without being guilty of breach of arrest—the offence made punishable by the last clause of the Article.[1] On the other hand, an officer is entitled to be held in arrest at his own military habitation or lodgings, and cannot legally be removed to and confined in a building, tent, &c., remote or separate from his proper quarters.

The term "confined" does not necessarily import that the officer is to be *detained by force*, or to be harassed or humiliated by any unnecessary restraint. Such a restraint would exceed the requirements of safe custody, and be in the nature of a punishment. Except, therefore, where an attempt to escape or some act of violence is to be apprehended from him, or where he is charged with an exceptionably heinous crime, or an aggravated breach of a previous arrest, he is not to be held under guard, and the commander will not properly place a sentinel over his quarters.[2] For an undue or unreasonable exercise of the power of arrest and confinement conferred by the Article, a commander will himself become amenable to charges.[3]

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1. "The article defines precisely what are the limits of an officer in arrest, unless when modified by his commanding officer, and an officer would no more be justified in exceeding them because they are not defined in the order arresting him than he would be in appearing with his sword because it failed to state that he had been deprived of it by his commanding officer." G. O. 42, Dept. of Washington, 1866. (Gen. Augur.)

2. See Samuel, 642; Simmons § 355; Hough, (P.) 19; 2 McArthur, 3: Delafons, 199, 204; Griffiths, 25; Maltby, 129; Macomb, 20; O'Brien, 154; De Hart, 75. 'In the dubious interval between commitment and trial, a prisoner ought in general to be used with the utmost humanity.' Adye, 144. The arrest, where the officer properly conducts himself, should not be so severe as to prevent the due preparation of his defence. James, 411. "Where the party may be outrageous, given to drinking, or subject to a temporary derangement of mind, sentries have been placed to prevent the possibility of his going from his confinement." Hough, 492. In the cases of breach of arrest published in the following Orders of the War Dept., the officer was confined under guard to his quarters: G. C. M. O. 441 of 1865; Do. 164 of 1866. The close arrest of an officer should not be characterized by an undue *publicity*, as tending unnecessarily to impair the respect in which he should be held by his inferiors. Hough, 461, note.

3. Samuel, 642; G. O. 59, Dept. of the South, 1862; Do. 251, War

The taking of the sword. The theory—it may be noted—of this further feature of a strict arrest under the Article is, that it formally suspends the officer from the functions of his office, and especially from the exercise of command.[1] The sword must of course be surrendered on demand:[2] this requirement, however, may be waived; the sword in such case, by a fiction of law, being nevertheless regarded as having actually been surrendered.[3] But that the sword is not in fact taken does not authorize the officer to appear with it during the continuance of the status of arrest.

Extension of Limits of Arrest—*"Close" and "open" arrest.* An arrest imposed according to the terms of Art. 65 is that which is termed "close arrest," or rather the arrest to which an officer is by strict law subjected is necessarily *close* arrest, unless expressly modified by the commander. The Article, indeed, in declaring that the arrested officer "*shall* be confined," &c., might perhaps be regarded as a mandatory statute, absolutely requiring a close arrest by confinement in all cases. No penalty, however, is prescribed for not complying with its injunction, and that the provision is to be viewed as directory only upon the commander, who may thus, in proper cases, at his discretion, make exceptions to the general rule, is indicated by the fact that, *pari passu* with the Article, has long existed and been in force the army regulation—now par. 866[4]—to the following effect:

Dept., 1863. As to his liability also to a civil suit for damages, see PART III.

1. O'Brien, 154; Harwood, 35. In the early cases of Gen. Hull, (1813,) and Gen. Gaines, (1816,) these officers are described in the records of trial as surrendering their swords *to the Court* before being arraigned. The Order, (of Nov. 11, 1816,) which promulgates the proceedings in the case of the latter, (who was acquitted,) directs:—"The President of the Court will restore the sword of Maj. Gen. Gaines, with a copy of these Orders."

2. In a case in G. O. 310 of 1863, an officer is convicted of "conduct unbecoming an officer and a gentleman" in first refusing, when placed in arrest, to surrender his sword, and then endeavoring to break it before delivering it up. At the "Simla court-martial," Capt. Jervis was convicted upon a charge of refusing to give up his sword on arrest. Simmons § 353, note.

3. See Tytler, 203; Hough, 460, 493; Griffiths, 24; Macomb, 19; Maltby, 129; O'Brien, 154; De Hart, 75.

4. The substance of this paragraph first appears in the Regulations of 1821. That the arrest, in the British military law, may be close or open at the discretion of the commander, is noticed in Hannaford *v.* Hunn, 2 C. & P. 158.

"An officer in arrest may, at the discretion of his commanding officer, have larger limits assigned him than his tent or quarters, on written application to that effect. Close confinement is not to be resorted to unless under circumstances of an aggravated character."

The result, in practice, is that in the great majority of cases, (especially where the detention is likely to be of considerable duration,) larger limits than the quarters of the officer are granted when asked; the arrest being in this manner reduced from a "close" to an "open" one, or an arrest "at large."[1] In many cases, indeed, more extended limits than those specified in the Article are allowed in the first instance and without being applied for, such limits being designated in the original order of arrest. Which of the two kinds of arrest shall be imposed rests wholly in the discretion of the commander. This discretion will be guided by a consideration not only of the nature of the offence and the conduct of the accused prior to and at the arrest, but of his state of health, the facilities required to enable him to confer with his counsel and prepare for his defence, the commodiousness or the reverse of his quarters, the season, climate, &c.;—the certificate of the medical officer, where the accused is ill, as to his physical or mental condition, the space properly required by him for air, exercise, &c., being of course always deferred to.[2]

The limits usually appointed or acceded, where a close arrest is not insisted upon, are commonly the boundaries of the camp, post, or station, or of a certain circuit of the neighborhood of the officer's quarters: at a post upon a military reservation, the range of the reservation, if not too extended, would in a proper case be accorded.[3] The limits once fixed may even be enlarged upon a

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1. As to the distinction between close and open arrest, see Tytler, 202; Hough, 494; Id., (P.) 21; Simmons § 354; Clode, M. L. 113; DeHart, 75; DIGEST, 119–120. That an open arrest, where the limits prescribed were "the City of Washington," did not impose a *physical restraint* entitling the officer to resort to a writ of *habeas corpus* for his release, see Wales *v.* Whitney, 114 U. S. 564.

2. See Tytler, 203; Hough, 460, 492, 493; Id., (P.) 19, 22; Clode, M. L., 113; Id., 1 M. F., 169, 171.

3. Griffiths, 24; Benét, 46–7; DIGEST, 119–120. And see G. C. M. O. 51 of 1867; G. O. 42, Dept. of Washington, 1866. In a case of breach of arrest in G. C. M. O. 37, Dept. of Texas, 1874, the order enlarging the limits of the original arrest, as set forth in the specifications, is as follows: "The limits of the arrest are so far extended as to allow him to leave his quarters at any time between reveille and retreat for the

second application. As to the number of applications there is no restriction: larger limits may first be refused on account of misconduct of the officer, and granted after his behaviour has improved. In some cases the scope allowed, in view of the rank of the party, the nature of the offence, &c., is so wide and general that the arrest becomes little more than a mere form.

Analogy of enlargement on bail. A theory which has been advanced to explain the practice of thus permitting an arrested officer to be at large is that the possession by him of a *commission*, which would be in danger of being forfeited if he violated his parole and escaped, is a sufficient *security*, answering to *bail* at the criminal law, for his not withdrawing himself from military custody, and for his appearance before the court for trial at the appointed time. In the words employed by Clode, "the officer gives bail in the value of his commission."[1]

Deferring of Arrest till Trial. The arrest of officers is so much a matter of discretion that cases are recognized in which arrest is not required to be imposed until just before trial. Par. 867 of the Army Regulations prescribes that—"In ordinary cases, and where inconvenience to the service would result from it, a *medical officer* will not be put in arrest until the court-martial for his trial convenes."[2] Other instances also may arise where,

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purpose of exercise, with permission to go beyond the limits of the garrison. He is not authorized by this order to enter any house." [The offence consisted in entering houses in an adjoining village without authority.]

In the British navy, the officer "is generally allowed to walk about the ship at large, (the quarter deck excepted,) without a sword." Delafons, 199. And see Hickman, 162. As to the practice in our navy, see Harwood, 36.

1. M. L., 113. And see Id., 1 M. F., 171. "It is an old and very good military maxim that an officer's commission is a good security against his breaking his arrest." Hough, (P.) 19. And see Adye, 144; Delafons, 199; Kennedy, 15; O'Brien, 153. "This affords one great reason for the distinction taken between a commissioned officer and soldier, in the circumstances of the arrest. * * * In all cases where the alleged crime, if proven, could not endanger more than an officer's commission, it may be said that this is a sufficient guarantee for the appearance of the accused, and that no other precautionary measure for that purpose would appear demandable." But in more aggravated cases, "additional securities should and ought to be taken." Samuels, 614.

2. See the case of a conviction of a superior officer, for a violation

because the officer is engaged upon some highly important service, or for other controlling reason, it may not be desirable to order him in arrest till the eve of trial.

Omission to Arrest. In some cases it has been omitted altogether to place the officer in arrest either prior to or pending the trial. These were mostly cases of officers of the higher grades, in which a trial was desired by the accused, and it was known that he would voluntarily appear before the court. The mere fact that the accused has not been subjected to arrest can in no case affect the jurisdiction of the court or the validity of its proceedings or sentence. If the accused of his own accord appears and submits himself to trial, the court is authorized to proceed in the case equally as if he had been brought before it compulsorily and in arrest. On the other hand an officer cannot refuse to appear for trial on the ground that he has not been put in arrest, or plead the omission in bar of trial.[1] An officer is not entitled to demand to be arrested prior to trial, and he must obey an order to present himself for trial with the same promptitude whether or not he may have been formally arrested. It is proper to add that an omission to arrest is an *irregularity* which must in general be prejudicial to discipline and the due administration of justice.

By whom Arrest is to be Imposed. Art. 65 indicates the "commanding officer" as the agent of arrest,[2] and par. 864 of the Army Regulations declares:—"None but commanding officers have power to place officers under arrest, except for offences expressly designated in the 24th article of war."

By the term "commanding officer," as applied to the *line* of

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this regulation, in G. O. 59, Dept. of the South, 1862, and Do. 251, War Dept., 1863. In an old Order, (A. & I. G. O.,) of Sept. 22, 1819, the conduct of a post commander, in placing the post surgeon in arrest under a sentinel, is disapproved as "contrary to the usages of the service and unjustifiable."

1. DIGEST, 119.

2. "The custody of the prisoner's person belongs to the commanding officer as a part of his command." De Hart, 81. "The commanding officer is the person vested with the authority of placing an officer in arrest, or soldier in confinement, and this for wise purposes; for, if any officer under his command could at pleasure, upon any fancied insult or supposed grievance, deprive another of his liberty, a regiment would exhibit a scene of disorder, anarchy, and a total absence of all discipline." Hough, 459.

the army, is meant the chief of the complete integral command or separate organization to which the officer is attached or with which he is serving—as the regiment, detached company, detachment made up from various companies or corps, garrison, post, &c. Thus a captain commanding a company would not properly place in arrest a lieutenant of his company, if the company was serving with and as a part of a regimental or post command, of which a superior to the captain was the commanding officer present: otherwise, if the company were quite severed and acting alone. As applied to the *staff*, the "commanding officer," in the sense of the Article, of an officer of the general staff would ordinarily be either the chief of the staff corps of which he was a member, or the division or department commander at whose headquarters or under whose immediate command he was serving;[1] or, if his station of duty were a separate post, the officer, superior in rank to himself, in command of the post, provided he were at the time under the orders of such post commander.[2]

Of course, here as in the other military relations, the "commanding officer" is not merely the immediate commander but also any superior of the latter who also commands him. Thus a department commander may place in arrest an inferior officer attached to a post command within his department. So the President may order the arrest of any officer of the army, and the general-in-chief the arrest of any officer under himself. In practice, the arrest of an officer proposed to be tried is not unfrequently originally ordered by the authority by whom the court has been or is to be convened. In some cases the arrest *must* be ordered by a superior to the officer who, as commanding officer, would otherwise be the proper person to order it. Thus a post commander could not properly place in arrest an officer of his command who had been detailed and was acting upon a court-martial assembled at the post by the department commander, but the latter would be the authority for the purpose.[3]

Excepted cases—Arrest by others than the commanding or superior officer. The exceptions referred to in par.

1. In the case of an aid-de-camp, the commanding officer would be the general to whose personal staff he belonged or was attached.

2. See G. O. 395 of 1863, in regard to the arrest of paymasters.

3. Hough, (P.) 711.

4, Army Regulations, as authorized by Art. 24, are those of quarrels, frays, and disorders," on the occasion of which any erior officer or non-commissioned officer of the army is emwered to place in arrest the participants though they be of perior rank. Thus a sergeant or corporal, in exerting himself quell an affray or riot, would be authorized to arrest a commisned officer engaged in it, and a lieutenant would be authorized arrest a captain, a field officer, &c.[1] There is nothing in this wer to excite apprehension; the inferior, in employing it, iply exercises an authority, analogous to that with which ry citizen is invested, to put a stop to a breach of the peace l arrest an affrayer;[2] and a military superior, arrested by an erior under the circumstances, instead of protesting, would in ieral rather have occasion to congratulate himself that he has n taken in hand by one of his own class rather than by a inge policeman or other civilian. Cases of such arrests, howr, must be of the rarest occurrence.

A further rare *exception* to the general rule is recognized in a e where a junior may be authorized to arrest a senior on acnt of some gross misconduct or criminal incapacity by which itary authority and discipline are paralyzed, and where the essity of the moment justifies the junior in assuming to super- his superior in the command. The leading case of this s is that of Lieut. Col. Hog of the British army, who was victed of drunkenness on duty on an inspection parade and iered. The court, in imposing sentence, remarked as fol-:—"The court conceives that it would be dereliction of were it to pass unnoticed so extraordinary and, as far as experience of the court extends, unprecedented an occure as that of a commanding officer being put in arrest, while ie actual command of a regimental parade, by a junior officer he corps." Upon this observation the comment of the reving authority, the Commander-in-chief, was as follows:— ie court are in error when they suppose that circumstances not occur, even upon a parade, to justify a junior officer in ng upon himself the strong responsibility of placing his

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See O'Brien, 106; De Hart, 76. That such was the construction ie similar British article, see Samuel, 400; Hough, 203.

See Burdett *v.* Abbott, 4 Taunt. 449, and the other authorities cited his subject in the author's note to DIGEST, 13; also *post*, Chapter V—"TWENTY-FOURTH ARTICLE."

commander in arrest: such a measure must alone rest upo responsibility of the officer who adopts it, and there are wherein the discipline and welfare of the service require th should be assumed."[1] This ruling has been recognized as by the later authorities.[2]

Status of Arrest. An arrest once duly imposed detache officer from the functions of his office: he may not assum command or to perform any military duty. At the same tir certain line of conduct becomes obligatory upon him. If clo confined, he cannot leave his quarters: if he does so, he render himself amenable to trial and to a sentence of dismi for the offence of breach of arrest, hereafter to be considered. his arrest is an "open" one—the privilege of extended li having been accorded him—he is considered as at large upon parole of honor, and, if he exceeds the limits assigned, is liab trial for a violation of the 62d article of war. He is also to form to military law, regulations and orders, precisely as i were not in arrest, and—in general—to be at least as circums in his behaviour as if he were at liberty and on duty; the that he is no longer a free agent not entitling him to cons himself irresponsible.[3]

There are also certain acts which, though not necessarily jecting an arrested officer to trial, are considered inappropr and indecorous, and, if aggravated or persisted in, may fur ground for charges. Thus par. 871 of our Army Regulat declares:—"An officer under arrest will not * * * visit cially his commanding or other superior officer unless sent In case of official business, he will make known his objec writing."[4] The Queen's Regulations prescribe:—"An office open arrest is on no account to appear in his own or any o mess premises, or in any place of amusement or public res and he is not on any pretext whatever to appear within the cincts of the station or garrison dressed otherwise than in

1. James, 840, 841.

2. Hough, 296; Simmons § 357; Gorham, 27; Manual, 29.

3. See Hough, 491.

4. Par. 870 assigns a place for arrested officers when the regimen company is "on a march."

form. An officer, when in arrest, will not wear sash, sword, or belts with his uniform."[1] These rules are in general equally appropriate to our service.

On the other hand, it devolves upon the commander to treat in a similarly formal and ceremonious manner an officer whom he has placed in arrest; all orders or communications made to him being properly transmitted in writing and through a staff officer.

The status of arrest affects in no manner the right of the officer to the pay and allowances of his rank. Unless in arrears to the United States, or held as a deserter, he is entitled to be paid precisely as if he had not been arrested.

So, as it has been held by the Judge Advocate General, an officer in arrest is not disqualified to prefer charges.[2] And it has further been held that an officer, though under arrest, was empowered to exercise the authority to quell frays and disorders devolved by Art. 24.[3]

But an arrested officer could not properly be allowed a leave of absence, except in some extreme case, as where considerations of humanity or justice required the granting of the indulgence, and in such a case the arrest would properly be temporarily suspended.

Term and Discontinuance of Arrest—*Discretion of commander.* Subject to the operation of the statutes yet to be considered, the matter of the release of an officer from arrest is, in general, quite within the discretion of the commander by whom the arrest was ordered.[4] An arrest being imposed with a view to trial is in general not discontinued till the trial has been completed and the judgment of the court finally acted upon. The original commander, however, if the case has not passed beyond his control, may, under exceptional circumstances, if he deems it just and proper to do so, release the officer from arrest without regard to the pending proceedings. But where the case has been formally submitted to the action of higher authority, as where a

1. Sec. 6, § 20. And see, as especially full on this subject, Hough, 491. The same author, (p. 494,) cites a case where certain subalterns were censured for persisting in associating in a marked manner with an officer while in arrest.

2. DIGEST, 120.

3. G. O. 92, Dept. of the South, 1872. (Gen. Terry.)

4. Samuel, 640; Kennedy, 15; Simmons § 368.

court-martial for the trial of the arrested officer has been convened by a superior of the original commander, the latter would not be empowered, except by the direction of the superior, to terminate the arrest.[1]

Absence of authority in the court. A court-martial can no more release from arrest than it can arrest an officer.[2] Even its acquittal does not enlarge the accused: it still remains for the proper commander to discharge him from the arrest as such, in and by the written order promulgating the proceedings or otherwise.

Absence of authority in the officer—His duty. Nor can the officer under any circumstances release himself from arrest. Moreover, when the authorized commander has released him, he cannot refuse to be released. The discharge from arrest is an *order* which, like any other military order emanating from a competent source, must be obeyed by its subject. The commander alone having authority in the matter, the officer is bound to accept his release as determining his status in regard to the case, and to resume the functions of his office. Even after charges have been duly preferred and served, he cannot, on being discharged from arrest and ordered to return to duty, persist in considering himself in arrest or entitled to a trial. The fact of arrest with charges gives him no right to demand a court; the granting of a trial in his case being a matter within the sole discretion of the department commander or other superior authorized to order one.[3]

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1. "The authority competent to direct the release of an officer must be the officer who imposed the arrest, or the superior to whom it may have been reported." Simmons § 368. And see Manual, 20. Our corresponding article of 1786 and 1806 contained, after the words "by his commanding officer," in the last line, the words, (now omitted,) "or by a superior officer."

2. So, having legally nothing whatever to do with the matter of arrest, a court-martial cannot, with a view to facilitate the defence of an officer, properly interfere with the continuance of a close arrest, nor, in its judgment, unfavorably criticise the action of the commander in imposing or continuing such an arrest. Hough, 461; Id. (P.) 20; Griffiths, 25.

3. Upon the subject of this paragraph, see Samuel, 639; Hough, 465, 494; Id. (P.) 21; Simmons § 368; Kennedy, 15; O'Brien, 15; De Hart, 76; Manual, 29, (citing Queen's Regs., Sec. VI, § 23.) As to the distinction in this respect between the military and the civil procedure, see In matter of Martin, 45 Barb. 144.

Constructive Release from Arrest. There are certain proceedings which, either in law or by the custom of the service, have been regarded as practically releasing an officer from arrest, because operating to discontinue the status of arrest. Thus it was held by Atty. Gen. Cushing[1] that the *promotion* of an officer, while he is in arrest, will have such effect: this because the promotion is a constructive pardon, and, the charge being removed, the arrest falls with it. So, putting an arrested officer on duty, or allowing him to do duty at his own request—as to go into an engagement with his regiment—will discontinue the arrest.[2] But here there is no pardon of the offender, nor can the action taken be pleaded in bar, or serve as a defence, upon a trial subsequently ordered: in such case the right to arrest is not divested by the action taken, but suspended only, and the officer, after the duty has been performed, may be re-arrested and arraigned.[3]

Term of and Release from Arrest, as governed by Express Statute—Arts. 70 and 71. Art. 70, which will be more fully considered in treating of arrests of *soldiers*, directs that:—"*No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.*"

From the use of the word "confinement" it is to be inferred that, as to *officers*, this Article applies only to those who are in close arrest, *i. e.* those arrested and held strictly as contemplated by Art. 65.

In the original article, as it appeared in the codes of 1775 and 1776, the word "conveniently" preceded and qualified the word "assembled." In view of its omission in the subsequent forms, the term "can be assembled" must, it is believed, be held to mean can *practicably* be assembled, *i. e.* as soon as the exigencies of the service may permit.[4]

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1. VIII Opins., 237.

2. DIGEST, p. 120. But ordering or permitting the officer to appear as a witness before a court-martial will not properly have such effect. Harcourt, 119.

3. The removal of an arrested officer to a new station does not *per se* suspend the arrest. See Cox *v.* Gee, Winst. L. & E. 134. The disposition of an arrested officer "on a march" is, as has been seen, regulated by par. 870, A. R.

4. Compare the construction of a similar provision by Atty. Gen. Wirt in I Opins. 300.

The effect of the Article, as to officers, thus is, that officers close arrest may not be retained in such arrest for a long period than eight days, unless a court-martial cannot practicab be assembled within that time. How much longer they ma be held if a court cannot thus be convened is left indefinite.

But here intervenes Art. 71, which provides, (among othe things,) that, "*except at remote military posts or stations*," (*i. e* those on the frontier, or which are distant because of the ab sence of facilities of communication therewith,[1]) officers o the army shall not be held in arrest for a longer period tha forty days. Construing this article with the former, the resul is that as to the excepted cases Art. 70 is left to apply withou qualification, while as to other cases it cannot be held to authoriz under any circumstances, a confinement before trial longer tha forty days.

Special Provisions of Art. 71. This Article is in full a follows:—"*When an officer is put in arrest for the purpose of trial except at remote military posts or stations, the officer by whose orde he is arrested shall see that a copy of the charges on which he is t be tried is served upon him within eight days after his arrest, an that he is brought to trial within ten days thereafter, unless th necessities of the service prevent such trial; and then he shall b brought to trial within thirty days after the expiration of said te days. If a copy of the charges be not served, or the arrested offic be not brought to trial, as herein required, the arrest shall cease But officers released from arrest, under the provisions of this article may be tried, whenever the exigencies of the service shall permit within twelve months after such release from arrest.*"

This provision, which was originally enacted as s. 11, c. 200 Act of July 17, 1862, and first appears as an article of war in th revised code of 1874, is comprehensive in its terms and applie to all arrested officers, whatever the form of the arrest, whethe "close" or "open." Its evident policy was to preclude pro tracted arrests and secure prompt trials. It may be said of it, a was remarked by Atty. Gen. Cushing[2] of an article of the nava code, (the present 45th,) that it is enacted in the spirit of th provision of the VIth amendment to the Constitution, that "i

1. See Waters *v.* Campbell, 5 Sawyer, 20.
2. VI Opins., 207.

ll criminal trials the accused shall enjoy the right to a speedy rial."[1]

Except as to the occasions expressly excepted of cases occurring "at remote military posts or stations," which are left to be governed by the provision of Art. 70 just considered, the present Article is absolute and mandatory. The term of the officer's arrest,—instead of remaining dependent upon the uncertainties attending the assembling of the officers necessary and proper to compose the court, the collecting of the witnesses at the place of trial, the movements of the army in war, or other incidents of the service,—is limited by the Article absolutely and under all circumstances to certain periods. If charges are not served upon him within eight days after the arrest, "*the arrest shall cease.*" If, having been duly served with charges, he is not brought to trial within ten days after the arrest, or—where the exigencies of the service prevent a trial by that time—within forty days at the longest, "*the arrest shall cease.*"

An enactment thus mandatory and explicit in the conferring of individual rights cannot be disregarded or evaded by a commanding officer.[2] But while, in view of the positive language employed, the officer becomes entitled to an immediate release from arrest, upon failure to serve charges or bring to trial as provided, and *is* released *in law*,[3] yet, if not released *in fact*, he cannot, from military considerations, be permitted to release himself. In deference to the principle of subordination which is the foundation of the military system, he must, if not discharged at the proper time, (as he should be,) duly make application to be

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1. The occasion of the enactment of this Article is understood to have been the protracted arrest and confinement at Fort Lafeyette, of Brig. Gen. Chas. P. Stone, U. S. Vols., who had been so held without trial for about one hundred and fifty days, when Congress, having become advised of the facts, inserted this provision for his benefit in an Act relating to the army. After its passage he was held thirty days longer, (the limit allowed by the statute,) and then released after a confinement of one hundred and eighty-eight days in all. Blaine's Twenty Years of Congress, vol. 1, p. 390.

2. "It would manifestly be an evasion of the Act if a (commanding) officer were to be permitted to keep an officer in arrest by *renewing* his arrest as often as it expired by legal limitation. The evil and injustice which this Act was designed to prevent would be equally as well accomplished by repeated arrests of eight days each as by one continued arrest." G. O. 86, Dept. of Va., 1865. (Gen. Terry.)

3. See G. O. 86, Dept. of Va., 1865.

released to the commander by whom the arrest was ordered. the application is disregarded, he may seek redress under tl 29th Article, if his case falls within its provisions;—or, if no may appeal for relief to superior authority.[1] He has the rigl of course to prefer charges against the commander for a failu to observe the injunctions of the statute.

While the fact of a prolonged arrest in contravention of th terms of the Article could not be pleaded in bar of trial when th officer came to be arraigned, this fact, in the event of a con viction, would properly go to induce a mitigation of the punisl ment, or would furnish good ground for a remission, in whole c in part, of the sentence by the reviewing authority.[2]

The effect of the concluding provision of this Article, con sidered in connection with Art. 103, will be remarked upon i Chapter XVI.

Breach of Arrest. Art. 65, which provides, as we hav seen, for the close arrest of officers by confinement in quarter declares further:—"*And any officer who leaves his confinemen before he is set at liberty by his commanding officer, shall be dis missed from the service.*"

The offence thus visited with an extreme punishment[3] is tha which is known in military parlance as *breach of arrest.* Thi term however is not exact or technical, and is sometimes car lessly employed in describing offences not within the purview c this, but cognizable only under the general 62d article.[4]

The leaving of the confinement. The "confinement' intended is clearly that designated in the first clause, viz. a con finement in 'barracks, quarters, or tent.' To constitute there fore a violation of the Article, the officer must (as shown by th written order of arrest, or testimony of adjutant, &c.[5]) have bee

1 DIGEST, 52.

2. See G. O. 44, Fifth Mil. Dist., 1868.

3. It was once punished with death in the British law. Samuel, 644 As to its gravity, see remarks of Gen. Augur in G. C. M. O. 37, Dept of Texas, 1874.

4 As to disorders, or acts of disobedience or neglect, by officers improperly charged under this designation, see *post.* The most fre quent misuse of the term, however, is in describing violations of arres by non commissioned officers and soldiers. See G. O. 19, Dept. of th Cumberland, 1867.

5 Hough, 494.

ıly confined in and to his proper quarters, (as heretofore de-
ned,) and must have quitted the same before being permitted
› do so by the proper commander.[1] The distance which he may
hus go is not material, nor is the period of time during which
ıe may be absent.[2] If he leaves, (except from necessity,[3]) the
›lace to which he is restricted, merely to proceed to some other
ıart of the same garrison, he is equally chargeable with a breach
›f the Article as if he had separated himself by a long distance or
ime from the post or station. In the cases, published in the
Ɔeneral Orders, of officers properly charged with, and convicted
›f, this offence, the same is alleged to have variously consisted—
n visiting without permission the quarters of the commanding
›fficer,[4] or those of another officer,[5] at the same post; in going to
he guard-house or visiting the guard;[6] going to the sutler's
tore;[7] attending as a spectator a trial by court-martial;[8] similarly
ttending a parade of the battalion;[9] riding outside the camp;[10]

1. The quitting must be of *quarters*. The conviction in the case in
ɔ. C. M. O. 93 of 1865, where the officer was charged with "breach of
rrest" in escaping from a *military prison*, (to which he had been com-
ıitted for the killing of a sutler,) was properly sustainable only on the
round that the pleading amounted to an allegation of an offence under
ırt. 62.

2. "Officers under close arrest ought to be extremely cautious not to
ıuit their quarters; * * * for to whatever trifling distance they may
ıave gone, or for whatever short time they may have been absent, a
eneral court-martial would be obliged to find them guilty of breaking
heir arrest." Kennedy, 15. "It is sufficient to prove in the case of a
lose arrest, that A. B. left his confinement; it matters not where he
ent to." Hough, 494. In G. C. M. O. 1, Dept. of Ky., 1865, is a
ase of an officer charged with breach of arrest in "leaving his state-
oom on a transport and going to the forepart of the cabin."

3. The order of arrest sometimes expressly provides for cases of
ıecessity. Note instances in G. C. M. O. 16, Dept. of the Miss., 1865;
Do. 18, War Dept., 1867.

4. G. O. 380 of 1863; G. C. M. O. 441, Id. of 1865; G. O. 111, Dept.
›f Washington, 1864.

5. G. C. M. O. 18 of 1867; Do. 29 of 1881.

6. G. C. M. O. 164 of 1866; Do. 57 of 1867.

7. G. C. M. O. 220 of 1866; Do. 29 of 1881.

8. See in Hough, (P.) 77, a case of an officer who, having been placed
n arrest while a member of a general court-martial, "went in person to
nake the circumstance known to the court," thus breaking his arrest.

9. G. O. 26, 1851; Do. 11, Army of the Potomac, 1861. In Do. 29,
Dept. of New Mexico, 1864, is a case of an alleged breach of arrest in
aving quarters and 'loitering about the post.'

10. G. C. M. O. 44, Army of the Potomac, 1864.

visiting a place of entertainment near the camp;[1] going outside the post into the neighboring town and appearing in public places;[2] crossing the Navy Yard Bridge from the District of Columbia and entering Maryland;[3] going to a public race-course and remaining two days absent;[4] going from Portland, Me., to Boston, and not returning till the fourth day,[5] &c.

The animus of the offender. It is to be remarked that the mere act of quitting the quarters, &c., without the proper authority, consummates the offence, whatever the intention or motive. Breach of arrest indeed ordinarily involves, with a disobedience of orders, a deliberate defiance or contempt of authority,[6] and hence the heinousness usually ascribed to it;[7] but an evil *animus* is not essential to constitute it, and an officer leaving his close arrest under the *bona fide* impression that he was authorized to do so, when in fact no such authority existed, would, strictly, be guilty of a violation of the Article.[8]

Defences. The nature of the offence is further indicated by the defences which have been set up to the charge. Thus it is

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1. G. C. M. O. 93 of 1875. And see Do. 115 of 1866.

2. G. C. M. O. 16, Dept. of Miss., 1865; Do. 42, Dept. of Washington, 1866.

3. G. O. 111, Dept. of Washington, 1864. And see a similar case in G. O. 84 of 1863.

4. G. O. 62, Dept. of the Gulf, 1864.

5. G. O. 43, Dept. of the East, 1864. In a case in G. C. M. O. 38 of 1867, the officer, in breaking his arrest, left the post and was absent 2 days,—for which he was, also, charged with desertion and convicted of absence without leave.

6. As indicated sometimes, not only by protracted absence on the part of the officer, but by such acts as resuming his sword or the exercise of his official functions, (See case in G. C. M. O. 57 of 1867;) disorderly conduct or insolence toward the commanding officer, (G. C. M. O. 44 of 1865;) refusing to return to his quarters, and only doing so when compelled by force, (G. C. M. O. 3, Div. of the S. West, 1865;) forcing a sentinel placed over his quarters, (G. C. M. O. 164 of 1866.)

7. See O'Brien, 154; De Hart, 80.

8. In cases where it appears that the accused has acted in good faith, in ignorance, or under a misapprehension of his strict military obligation, the court has not unfrequently recommended and the reviewing authority granted a remission or commutation of the sentence. As in an early case in G. O. 27 of 1835, where the breach consisted in going to the mess-house. And see a similar case in G. C. M. O. 18 of 1867, where it consisted in going to the sutler's store.

) defence that the officer was *innocent* of the offence for which : was arrested and confined and that the arrest was therefore nwarranted.[1] The question of the guilt of the accused upon ıe original charge cannot be tried in this proceeding, and evi- ence offered to show that he was not guilty will be irrelevant nd inadmissible. Even if innocent in fact, his arrest would not ıecessarily be illegal; the commander being, in his discretion, uthorized to arrest upon reasonable grounds of suspicion. Nor s it any justification for a breach of arrest that the quarters of the fficer were in bad repair or otherwise unsuitable as a domicile;[2] or hat the arrest, by reason of the unnecessary placing of a guard over he quarters, or otherwise, was unjustifiably severe;[3] in such cases he officer's proper course is to apply for relief to the commander, r, if he refuses it, to the proper superior. But that the arrest ras ordered by an officer without authority to impose it, would e a complete defence: what officers have authority to institute rrests has been heretofore considered. It is also a complete de- ıce that, subsequently to his original confinement, the accused as been put on duty or allowed to do duty,[4] provided that, be- ıre the breach assigned, he had not been duly re-arrested and :-confined.

Acts not constituting the specific offence. The character : the offence is also illustrated by distinguishing it from certain :ts sometimes charged under Art. 65, but which are properly :ts in disobedience of orders or merely acts prejudicial to good :der and military discipline. Thus a non-compliance with an :der of arrest, in refusing to be arrested or confined, or of an :der requiring the officer to report in arrest to a certain com- ander, however grave a dereliction, does not constitute the fence under consideration. Nor does a transcending of limits, ter larger limits than those of the original close arrest contem- ated by the Article have been allowed the officer, constitute e offence, though it may indeed involve a still higher crim- ality.[5] So, for an arrested officer to quit his company or regi-

1. "It does not signify whether he was placed in arrest with or without ıse." Hough, 494.

2. G. O. of Oct. 31, 1809.

3. G. O. of Sept. 22, 1819.

4. See Hough, (P.) 19.

5. In G. C. M. O. 37, Dept. of Texas, 1874, Gen. Augur, in referring

ment, when personally with it in the field or on the march, is an offence quite other than a violation of this Article.

Further, the specific offence being restricted to the single act indicated, no infraction or non-observance of any condition or obligation incident to the status of arrest *other* than that to remain confined till liberated, will of itself amount to such offence. Thus the wearing of his sword by an officer while confined in arrest, is not, *per se*, a technical breach of arrest, nor is the issuing of an order or other assumption of official authority. Nor, again, will drunkenness, disorderly conduct, or other improper or criminal act of which an officer, while remaining strictly within his confinement, may be guilty, however gross the same may offend against good order and military discipline, amount to the particular delinquency under consideration.

The setting at liberty. This proceeding of the commanding officer, which alone will discontinue the close arrest, may be resorted to presently upon the arrest, and either by the commander of his own motion or in compliance with an application by the accused, or may be delayed till the trial has been completed and the judgment finally acted upon.[2] But where indeed the *limits* of the strict arrest have been *extended* by the commander, as where the officer, confined upon arrest to his quarters, has been allowed the range of the post or station, he is, so far as concerns the application of the Article, as effectually "set at liberty" as if the status of arrest had been discontinued altogether.

II. ARREST OF ENLISTED MEN.

This subject is regulated mainly by the 66th and 70th Articles of war, but in part also by Arts. 67, 68 and 69.

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to cases of transgressing *extended* limits of arrest, as not "technically fulfilling the requirements of" the Article, adds that the same "nevertheless involve as much if not more moral turpitude in their commission, inasmuch as the greater the liberty accorded to an officer, and the confidence reposed in him, the greater are his obligations not to abuse the confidence."

1. See De Hart, 80; Benét, 47–8.

2. Precedents of cases of officers convicted of breach of arrest in leaving their quarters and going at large, after their trials had been completed, but before they had been duly released from arrest, are found G. O. 80, Army of the Potomac, 1862; Do. 43, Dept. of the East, 1864; G. C. M. O. 15, War Dept., 1866.

ıvision of Art. 66. This Article declares that:—"*Sol-*
:harged with crimes shall be confined until tried by court-
ıl, or released by proper authority."

ıeral effect. The term "crimes," like the word "crime"
;ed in Art. 65 and heretofore interpreted, is evidently a
l designation intended to include all substantial military
s, both those purely military and those having a civil as-
s homicide, assault, larceny, &c. This Article is a general
f administration and discipline. We have in our law no
ıystem of disciplinary punishments, imposable by com-
ıg officers independently of courts-martial, as is found in
ıf the European codes. Our soldiers, therefore, when, as
cpressed in the Article, "charged with crimes," must—to
ally punished—be "tried by court-martial." The great
ty indeed of their offences are disposed of, comparatively
ırily, by the inferior courts. But in all cases, the trial, by
rection of this Article, is to be preceded by arrest in the
f *confinement.*

whom the arrest is to be made. While in a case
ng immediate action the arrest of a soldier may legally be
ɔy any commissioned officer, or, if none be at hand, non-
ssioned officer, the proper person in general to make or
he arrest is the officer commanding the company or other
.iate commander of the offender.[1] Such also is the proper
ity to make the arrest of a non-commissioned officer. In
e, however, a discretion for making arrests of enlisted men
ɔunt of ordinary offences is commonly delegated by com-
rs to 1st sergeants or other non-commissioned officers.

m of the arrest. "The arrest of a soldier is confine-
'[2] It is indicated by the authorities[3] as a reason why con-
nt is the form of arrest specifically prescribed for enlisted
hat military superiors, if liberty were allowed the pris-
vould not have that security against escape which, as
ore remarked, they have in the case of an officer allowed

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to the authority of a policeman, or any civilian, to arrest, with-
warrant, a deserter at large—see Chapter XXV—"FORTY-
H ARTICLE."

ɔde, M. L., 113; Manual, 28.

muel, 641; Clode, M. L., 113; O'Brien, 154.

to be in arrest at large, and that, therefore, to make sure of ho ing the party, a closer arrest must in general be imposed.

As to the *mode* in which the confinement is to to be execute it is directed in par. 173, Army Regulations, in regard to n *commissioned officers*, that they "are not to be sent to the gua room and mixed with privates during confinement, but to be c sidered as placed in arrest, except in aggravated cases where esc may be apprehended."[1] The phrase "placed in arrest," as h used, evidently imports a mode of arrest similar to that prescri for officers by Art. 65, *viz.* arrest by confinement in "barrac quarters, or tent."

The private soldier, when placed in arrest, is confined in guard-house or other appropriate place of restraint, a senti being usually posted either without or within.[2]

Status of arrest—Treatment. A prisoner is to be p sumed to be innocent till duly convicted, and till thus convict he cannot legally be punished as if he were guilty or proba so. The arrest by confinement of an enlisted man with a v to trial and for the purposes of trial is wholly distinguished fr a confinement imposed by sentence. It is a temporary restra of the person, not a punishment, and should be so strict only may be necessary properly to secure the accused. Anyth further is unauthorized.[3] The imposition upon soldiers, wh confined in arrest, of disciplinary punishments is, in our servi wholly illegal. In one of the Orders last cited,[4] Gen. Hanc condemns as unlawful the treatment of a soldier thus confi who was compelled to carry a heavy log for long periods, a because of such treatment, remits the sentence subsequen

1. This regulation is taken from an almost identical provision form contained in the Queen's Regulations. Simmons § 358; Griffiths, In the existing British law, the arrest of non-commissioned office even more closely assimilated than formerly to that of commissic officers. See Manual, 30.

2. Simmons § 358; De Hart, 76. As to the form of arrest in cas retainers, camp-followers and the like, this, in the absence of statu provision on the subject, must be left to the discretion of the comman officer, to be guided by the circumstances of the particular case.

3. See O'Brien, 154; G. O. 35, Dept. of the Cumberland, 1869; 23, Dept. of the Lakes, 1870; Do. 106, Dept. of Dakota, 1871; C M. O. 4, Dept. of the Columbia, 1881.

4. G. O. 106, Dept. of Dakota, 1871.

imposed by the court. In a case promulgated by him in Orders,[1] Gen. Dix comments with severity upon the fact that three soldiers, arrested as deserters, were, before trial, besides being heavily ironed, paraded in front of the regiment with their heads shaved. In a further Order,[2] the reviewing authority reflects similarly upon the treatment of a soldier who, on arrest, had been imprisoned in a dark cell for fourteen days with ball and chain.

Placing irons on a soldier, while confined in arrest awaiting trial or sentence, can be justified only when the same may be necessary, or a proper precaution, to prevent an escape or the doing of violence. A resort to manacles may sometimes be required for the reason that no secure guard-house or other sufficient place of confinement exists at the station. It must always, however, be an exceptional measure, and should be reserved for extreme cases.[3]

No military duty can properly be imposed upon a soldier while remaining under arrest.[4] If required by some exigency of the service to be employed, he should first be released from arrest. Placing him on duty would indeed suspend the arrest *per se*.[5]

A soldier, upon arrest, cannot properly be deprived of money or other property belonging to him, unless there be reasonable ground for apprehending that he may attempt to escape, and the possession of such property would facilitate his doing so.[6] In such case the same may be taken in charge by the commander, to be returned at the conclusion of the proceeding.

Term of and Release from Arrest—Arts. 66 and 70. Art. 66 declares that the confinement in arrest shall continue

1. G. O. 23, Dept. of the Lakes, 1863.
2. G. O. 35, Dept. of the Cumberland, 1869.
3. Simmons § 359; Clode, M. L., 113; Id., 1 M. F., 169; Manual, 30; G. O. 26, Dept. of Cal., 1866. The following reference by Judge Story, in Steere *v.* Field, 2 Mason, 516, to the law relating to prisoners arrested for debt, is singularly applicable to cases of military prisoners held in arrest preparatory to trial, and shows also how old is the principle governing the general subject:—"By the ancient common law, prisoners were not allowed to be kept in irons, for the reason, assigned by Bracton, *quia carcer ad continendos non ad puniendos haberi debeat.* And Lord Coke significantly observes that where the law requireth that a prisoner should be kept in *salva et arcta custodia*, yet that must be without punishment to the prisoner."
4. Manual, 30.
5. Hough, 401; Griffiths, 72.
6. Compare Allen *v.* Colby, 47 N. H. 544.

commander, or by his judgment of the convenience of the service, but that in every case, where war or other controlling exigency did not prevent,[1] the court should be assembled at the earliest date at which, by the exercise of reasonable diligence, the members could be brought together. O'Brien[2] observes of the Article that its effect is "to make it obligatory on those having authority to assemble the court as speedily as may be. It also," he adds, "makes it a duty to bring all prisoners to trial by the first court having cognizance of their cases, which may convene." If indeed a court, having jurisdiction of the case, were already assembled, it would accord with the spirit of the Article if the accused were ordered before it as soon as practicable, and his detention in arrest thus correspondingly abridged.

Unreasonable arrests. In practice, however, enlisted men have not unfrequently been detained in arrest and confinement for long and apparently unreasonable periods before trial, and while the officer responsible in such a case would be amenable to military justice under the general—62d—Article, (as well as to civil suit for damages,) it would be well if our code embraced a specific article corresponding to the recent 74th of the British Articles, now incorporated in sec. 21 of the Army Act, which provides that an officer who "*unnecessarily detains a prisoner in arrest or confinement without bringing him to trial, or fails to bring his case before the proper authority for investigation,*" shall, on conviction, be liable to be cashiered, or to suffer some lesser punishment according to the circumstances of the case.

Where indeed soldiers of our army are detained in confinement for unreasonable periods prior to trial, or after trial and before promulgation of sentence, and have in their sentences been condemned to terms of imprisonment,—while the period of the detention cannot legally be credited upon the term of confinement in executing the latter, the same may well be mitigated and reduced by the reviewing authority, (in approving the sentence,) by a period equal to that of the protracted confinement in arrest.[3] This action has been repeatedly taken in practice.

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1. In Delap's Case, a detention of the accused in arrest nearly three and a half months before trial was held not unreasonable, in view of the state of war then existing, (in Florida.) G. O. 13 of 1843.

2. Page 155.

3. DIGEST, 120; G. O. 105 of 1874; G. C. M. O. 63 of 1874.

Provisions of Arts. 67, 68 and 69. These Articles, (c which the originals are to be found in the Code of James II,) re late to the commitment of "prisoners" (mainly arrested sol diers) to the guard-house, and to their custody and disposition they may, therefore, properly be considered in this connection.

Art. 67. This Article provides that:—"*No provost-marshal, or officer commanding a guard, shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the forces of the United States; provided the officer committing shall, at the same time, deliver an account in writing, signed by himself, of the crime charged against the prisoner.*"

Duty and right of officer of the guard. The proper construction of this Article appears to be that it is thereby made mandatory upon the (provost-marshal[1] or) officer of the guard to receive and keep prisoners committed to his custody by any other military officer, in every case where a written charge of a military offence is presented at the same time with the prisoner,[2] but that, where no such charge is rendered, he is at liberty to refuse to receive the prisoner.[3] That he *may* receive and confine

1. As to this official, not at present known, as such, to our service in general—see Chapter XI.

2. Wolton *v.* Gavin, 16 Ad. & El. 69, 76. And see Id. 65, where Lord Campbell observes that—"the duty of receiving and keeping the prisoner arises *eo instanti*" upon the one condition specified in the Article, *viz.* the delivery of the written charge, being complied with; adding—"that the burden of making inquiry as to the propriety of the arrest is not cast upon the" officer of the guard, "but that he is bound to receive the prisoner immediately the condition is performed." And see Clode, M. L., 114. In the other principal adjudication upon this Article—Smith *v.* Shaw, 12 Johns. 269—the court remark:—"The Article virtually confers on any officer belonging to the forces of the United States the power of committing as prisoners such as have committed offences cognizable by military law." And see Hough, 473, who also construes the term "forces" (in the corresponding British article) as referring exclusively to the military forces, and observes that it does not preclude the officer from committing a prisoner that may happen to belong to a regiment or corps other than his own. "Forces of the United States," as employed in our Article, would certainly include a detachment of *marines* serving with the army as indicated in Art. 78.

3. The American authorities, (see O'Brien, 155; De Hart, 73; Benet, 50,) have generally held that the officer of the guard is properly required to receive and confine the prisoner, (if a person amenable to military law and committed by a responsible officer,) whether a verified writ of charge be delivered with him or not; following here the view and using in substance the language of Simmons (§ 362,) in treating of the c

s in the absence of a written charge is illustrated by par. he Army Regulations, providing for the discharge, (un- :rwise specially ordered,) of prisoners "without written " at the next guard-mounting; but that he may also, at 'etion, decline to receive them, under such circumstances, :d to be clear from the terms of the Article. Thus, while not unfrequently feel warranted in accepting into custody er upon a verbal charge alone where the committing offi- iown to him as an officer in good standing in his own or regiment or corps, he will yet be authorized, and it will uty, to refuse to accept him in a proper case,—as where, nce, he has reason to believe that the officer is not re- e, or acting in good faith, or that the prisoner has not ilty of a military offence.[1] In any such instance he is before consenting to take the party in charge, to insist ; a warrant for the commitment, a duly authenticated accusation. To require the written statement will indeed l occasions the *preferable* course, as that which will best the soldier against unfounded arrests, ensure the prisoner a neglect of his case and improper detention, and conduce rder and convenience of the command.[2]

"*account in writing,*" *or charge.* It will indeed aratively rare, in time of peace certainly, that the com- officer will not be enabled readily to comply with the of the Article. The "account in writing of the crime " need not consist of a charge and specification in the the technical pleading upon which an accused person is d before a court-martial, but may be of the most informal r, consisting merely of the name or description of the n general terms and as designated in common parlance— nkenness," "Disobedience of Orders," "Larceny," &c.[3]

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ng British article. But these authorities have not apparently :d the marked distinction between the form of our article and :h; the latter not containing the word "provided," or any term r effect, but consisting of two separate and distinct clauses en- istinct and independent obligations.

the last two notes.

G. O. 129, Dept. of the Gulf, 1864; Do. 26, Dept. of Cal.,

: may not be in the power of the officer to give the precise which are to be exhibited against the accused, which are indeed

Further, to avoid the embarrassment of executing and fi separate writing with each commitment, the name of the pr with the offence charged may conveniently be entered in a report book prepared with blanks for the purpose, with a also for the signature of the committing officer. Thus the l upon the delivery of the prisoner, will simply have to fill o the book, the particulars indicated and make the commi official by his signature opposite, and the Article will be complied with. This is the form generally pursued at our tary posts.

The military offence impliedly created by the Ar It may be remarked that, although the Article fails to a any penalty for the act of refusing to receive and keep a pri when accompanied by a written charge, such act may pro be treated as conduct prejudicial to military order and disci and so punishable as an offence under Art. 62.[1]

Art. 68. This Article prescribes as follows:—"*Every to whose charge a prisoner is committed shall, within twent hours after such commitment, or as soon as he is relieved fro guard, report in writing, to the commanding officer, the na such prisoner, the crime charged against him, and the name officer committing him; and if he fails to make such repo shall be punished as a court-martial may direct.*"

Purpose of the Article. The chief intent of this st evidently is to preclude the unreasonable detention without of the prisoners committed daily to the guard-house at posts and to secure them a prompt trial by bringing the cases, twenty-four hours, (or at other brief regular periods,) t attention of the commanding officer, who, upon an examin of the facts reported, may determine then and there, so

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subject to be altered by the commanding officer; therefore it is suf to exhibit such an accusation in writing, (signed by the party co ing, with his name, rank and regt.,) as shall indicate the nature alleged offence." Hough, 474.

[1] In G. O. 33, Dept. of the South, 1864, is a precedent of a c Captain and Provost-Marshal of a Division, convicted of refusi receive a prisoner committed to him by another officer with a w statement of the offence; the charge, though erroneously laid the specific article, (the then 80th, now 67th,) being a sufficient pl of an offence under Art. 62.

power, whether the parties shall be tried or released.[1] r, the report being duly made, the commander becomes .cer responsible for the proper disposition of the cases.[2] mmanding officer referred to in the Article is of course .d of the command by the guard of which the prisoners een held, that is to say the officer commanding the regi- letachment, garrison, post, &c.

offence, how proved. The offence made punishable by ticle, of failing to make the required report, would be es- ed by proof that no report whatever was made, or that it t made in writing, or that it did not set forth some one or f the particulars prescribed, or that it was not made at the d time.[3]

69. This Article directs that:—"*Any officer who pre- without proper authority, to release any prisoner committed harge, or suffers any prisoner so committed to escape, shall shed as a court-martial may direct.*"

ct and construction. The object of the Article is to en- e safe custody of soldiers under arrest and other prisoners, prevent their discharge except by the authority of the commander. It therefore makes punishable, at the dis- of the court, the *two* offences of *releasing a prisoner with- hority* and of *suffering an escape.*

term "any officer," while no doubt principally contem- officers commanding post or camp guards, or in charge of of confinement, will include also an officer to whom a r may be specially committed as a personal trust, whether he be furnished with a guard. The term "any prisoner," having probably special reference to soldiers confined rrest, or the class of prisoners indicated in the two pre- articles, embraces any other species of prisoner properly ted to the charge of an officer of the army, whether mem- the army, camp-follower, prisoner of war,[4] person held as

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e Hough, 489; Simmons § 361.

e Hough, (P.) 23.

e Hough, 490.

e of the most conspicuous cases of a breach of this specific article he late war was that of a Lieut. commanding a guard on board a

a spy, or for a violation of the laws of war, or other party itary or civil.

Unauthorized release. The fact of the omission to pı any charge upon the commitment of the prisoner would no *se* authorize his release.[1] Nor would the fact that the o: charged is a trivial one, or that the accused is innocent c charge, or that the commitment is illegal, have such effect; being circumstances to be considered and acted upon by su] authority.[2] The "proper authority" specified in the A is of course the chief of the command by the guard of ı the prisoner is held, (and to whom the report required b previous article has been made,) or, in the case of a specia sonal trust, the authority imposing the same, or the milita: perior to whom the case may have been formally submitte official action or under whose control it may otherwise come.[3]

Suffering an escape. This was an offence punishal common law about which much learning is to be found i: reports and treatises.[4] Two degrees or kinds of the offence recognized—*voluntary escape* and *negligent escape*;[5] the "escape" being used in criminal law to express the suff of an escape on the part of the keeper more commonly tha: act of the prisoner in getting away, which is technically k: as "prison-breach" or "breach of prison." Voluntary e is defined to be—"where the sheriff intentionally or know permits the prisoner to go at large;" negligent escape—"ı the prisoner breaks out of prison and is at large, without the sent, but through the negligence, express or implied, o sheriff."[6] The former offence was viewed as a graver one

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transport, who was convicted of suffering the escape of three confe prisoners of war, (commissioned officers,) in his charge. G. O. 8 West Miss., 1865.

1. Hough, 480; Id., (P.) 23.
2. Hough, 480.
3. Id. And see Simmons § 361.
4. See Steere *v.* Field, 2 Mason, 486, and cases cited; 2 Bish L. § 1092–1106; 1 Hale, P. C., 590–605; 2 Hawkins, c. 19; 1 G c. 20.
5. 1 Russell, 418; 2 Bishop, C. L. § 1095.
6. Adams *v.* Turrentine, 8 Ire. 147.

the latter; its degree in law being held to be the same as that of the original crime of the prisoner whose escape had been permitted; so that, if the prisoner were confined for felony, the voluntary suffering of the escape on the part of the keeper would be indictable as felony.[1] A "negligent" escape did not rise above the degree of misdemeanor.[2]

It is quite clear, under the general language of the present Article, (and has been thus held by Hough,[3]) that the offence made punishable therein may consist either in a voluntary act or in act of negligence; and it is manifest that the former would properly call for a more severe punishment than the latter.[4]

So, such of the principles of the law relating to the criminal offence as are apposite to military cases may well be here applied. For example, at common law, the fact that the prisoner returned of his own accord did not, *per se*, excuse a negligent escape, (*i. e.* suffering of an escape,) once consummated.[5] Nor did the fact of recapture of the prisoner have such effect,[6] unless he were

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1. 1 Russell, 418; 4 Black. Com., 130; 2 Wharton, C. L. § 1667; 2 Bishop, C. L. § 1095, 1099; Weaver *v.* Com., 29 Pa. St. 445.

2. Dalton, c. 159; 2 Wharton, C. L. § 1667.

3. This author, (p. 484,) referring to the corresponding British article, observes that the offence is committed 'not only where the officer allows the prisoner to escape, (intending it to take place,) either by reconcert or by giving the opportunity with a criminal intention, but also and equally where, by want of precaution, or the neglect of duty, or disobedience of orders issued relative to the security of prisoners, the escape takes place.'

4. 4 Black. Com., 130; Hough, 481, 485. Blackstone observes that the "officer permitting an escape, either by negligence or connivance, is much more culpable than the prisoner" whose escape is effected. Hough, 487, cites an exceptionally severe and ignominious sentence adjudged in India in 1819, and confirmed, in a case of a native officer, convicted of gross negligence in suffering the escape of an important prisoner, (under circumstances indicating also connivance,) as follows:—"To be dismissed the service, to have his sash burnt, and his sword broke over his head, in front of the troops at the station; after which to have a halter tied round his neck, and to be drummed out of cantonments."

5. Bank of U. S. *v.* Tyler, 4 Peters, 389; Briggs *v.* Cramer, 2 South. 18; Nall *v.* State, 34 Ala. 262. So, in G. C. M. O. 25, Dept. of Cal., 1883, Gen. Schofield, in approving a conviction of a violation of Art. 62 allowing a convict prisoner to escape, remarks:—"Neither the recapture of an escaped prisoner, unless the same be immediate, nor the subsequent voluntary return of the prisoner himself, can excuse an escape suffered through a neglect of duty on the part of the keeper."

6. Bank of U. S. *v.* Tyler, *ante*.

immediately pursued and retaken before being lost sight of.[1] The death of an escaped prisoner before recapture did not "purge" the escape.[2] The rule, however, as to what acts will constitute negligence is not so strict at the military as at the common law.[3] Thus, where a prisoner has succeeded in effecting his escape through the insecurity or inadequacy of the guard-house or prison, which it was the business of superior authority to have made secure or sufficient, the officer in charge cannot in general properly be held responsible under this Article. Otherwise, however, where the escape is effected by reason of a neglect on his part to take precautions within his power and duty. As where he neglected to cause the prisoner to be properly restrained or guarded;[4] or where he failed to have him searched when there was reasonable ground to believe that he might have, and he had in fact, an implement suitable for securing his escape concealed upon his person; or where he permitted the prisoner to have private interviews with improper persons by whose aid the escape was facilitated.[5]

As to the proof of the offence, it is further held at the common law—and the same principles are applicable here—that, while it should appear that the arrest and commitment were legal,[6] it need not be shown that the prisoner was actually guilty of the offence for which he was arrested,[7] or that the officer had knowledge of his guilt.[8] The latter, at military law, is absolutely re-

1. 1 Russell, 419; 2 Bishop, C. L. § 1095; Whitehead *v.* Keyes, 1 Allen, 350.

2. Whicker *v.* Roberts, 10 Ire. 485.

3. The common law rule was that nothing short of an act of God, or of the public enemy, or of irresistible adverse force, (as in case of *rescue*,) would excuse a *negligent* escape. (2 Wharton, C. L. § 1668.) It may be added that the strict common law rule that "every liberty given to a prisoner not authorized by law" is a voluntary escape, (Steere *v.* Field, *ante*,) is not applicable to military cases. Such a liberty, if the prisoner was thereby enabled to get away, would be evidence of the voluntary or the negligent act, according to circumstances.

4. See Hough, 480.

5. Id., 479.

6. 1 Russell, 417; 2 Wharton, C. L. § 1667; 2 Bishop, C. L. § 1094.

7. 2 Hawkins, c. 28, s. 16; 2 Wharton, C. L. § 1668, note. Nor, as remarked under the head of *unauthorized release*, is it material whether the offence with which the prisoner was charged was a grave one or the reverse. This point, however, may be considered in awarding punishment.

8. Weaver *v.* Com., 29 Pa. St. 445. Nor can the officer show, by

quired to hold the prisoner duly entrusted to his charge, without any regard whatever to the question of his guilt or innocence—an issue which cannot be, directly or indirectly, taken cognizance of in this proceeding.

It is further held by the authorities that the mere fact of escape, appearing without other circumstances, raises a presumption of at least negligence on the part of the keeper, and that the *onus* of rebutting this presumption then rests upon him;[1] and a similar rule may in general be applied to a case of escape suffered by a military officer.[2]

While the offences of voluntary and negligent escape are distinct, it is yet held that gross negligence may be given in evidence to show a voluntary escape;[3] and further that, under an indictment for a voluntary escape, the defendant may be convicted of a negligent escape, the former offence properly including the latter.[4] So, at military law, where the specification, under a charge of a violation of the present Article, sets forth an escape in its nature voluntary, the charge will be sustained by proof of acts of negligence only, and the accused may be convicted of both charge and specification, the proper exceptions and substitutions being made in the finding upon the latter.

The present Article applies only to officers. A non-commissioned officer, or soldier, (as a sentinel or guard,) permitting an escape, is of course liable, for his offence, to charges and trial under Art. 62. So also is the enlisted prisoner who effects his escape: if his design, however, is not merely to evade his confinement but to abandon the service, his offence is desertion.

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way of defence, that the prisoner was in fact innocent of the offence charged. Nor, in a case of an alleged suffering of an escape of a prisoner while *under sentence*, would it be admissible for him to show, in defence, that the sentence was illegal.

1. "An escape implies the negligence or connivance of the officer." 1 Gabbett, 298. And see 1 Hale, P. C., 601; 1 Russell, 419; 2 Wharton, C. L. § 1668; 2 Bishop, C. L. § 1096; Adams *v.* Turrentine, 8 Ire. 147; Blue *v.* Com., 4 Watts, 215.

2. See O'Brien, 156.

3. Smith *v.* Hart, 1 Brev. 146.

4. Skinner *v.* White, 9 N. H. 204; Fairchild *v.* Case, 24 Wend. 380; Hall *v.* State, 34 Ala. 262.

CHAPTER X.

THE CHARGE.

The Arrest of the accused is usually accompanied or presently followed by the service upon him of the charge or charges upon which it is proposed that he be tried. Here then may properly be presented the general subject of the military Charge, as framed, preferred, completed and served; leaving the forms of specific charges to be indicated in the Appendix.

The subject will be considered under the following heads:—

I. Nature, form, and requisites of the Charge in general.
II. Rules for framing the Charge derived from the law of Indictments.
III. Rules of military law in regard to the framing of the Charge.
IV. The Preferring of Charges.
V. The Referring of Charges for trial.
VI. Amendment of Charges after reference for trial.
VII. Additional Charges.
VIII. The Service of Charges.

I. NATURE, FORM, AND REQUISITES OF THE CHARGE IN GENERAL.

Definition, and Formal Parts. The Charge, in the military practice, like the indictment of the criminal courts, is simply a description in writing of the alleged offence of the accused. In the great majority of cases it is the only formal written pleading upon a trial by court-martial.

In our practice this pleading, to which as a whole the name of Charge is applied, is divided into two portions; the first in order being, in contradistinction to the other, technically called "charge," and the second being termed the "specification." The office of the *charge*, in this its relative sense, is to designate the specific military offence, made punishable by an Article of

war or other statute, which is attributed to the accused: that of the *specification* is to set forth the acts or omissions of the accused claimed to constitute the offence named in the *charge*.[1]

Object and Essentials. The purpose and province of the Charge are:—1st. To inform the accused of the precise offence attributed to him, so that he may intelligently admit, deny, or plead specially to, the same; 2d. To advise the court and the reviewing authority of the nature of the accusation, and of the Article or other statute upon which it is based, so that the former may rightly and judiciously try, determine, and (upon conviction) sentence, and the latter may understandingly pass upon all the proceedings; 3d. To so define the alleged crime or misconduct that the accused, if subsequently called to answer before any tribunal for the same act, may be enabled to plead and to prove that he has once been acquitted or convicted of the identical offence.[2]

Such being the nature and object of the Charge, it may be said, generally, as to its requisites—1, that it must be laid under the appropriate Article or other statute; 2, that it must specify the material facts necessary to constitute the offence.[3]

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1. The difference between this manner of statement and that formerly employed in the British service, where charge and specification were usually blended together, and the pleading was inartificial as compared with our form, is remarked upon in the opinion of Atty. Gen. Cushing in Col. Montgomery's case, (VII Opins. 603,) and may be noticed in James' Collection of Precedents, and the works, especially, of Hough and D'Aguilar. In the late "Rules of Procedure," however, (see "First Appendix" to same,) the forms of charges are carefully revised, and the mode of statement is more assimilated to our own.

2. See I Opins. At. Gen., 296; Kennedy, 69; Remarks of J. A. Gen. Sutton in Col. Quentin's Trial, p. 81; Macomb, 25; O'Brien, 234; De Hart, 287, 291–2. As to the similar purpose and use of the indictment, Bronson, C. J., in People *v.* Taylor, 3 Denio, 95, observes:—"Certainty is required to the end that the defendant may know what crime he is called upon to answer; that the jury may be able to deliver an intelligible verdict, and the court to render the proper judgment; and finally that the defendant may be able to plead his conviction or acquittal in bar of another prosecution for the same offence." And see 2 Hale, 187, note 7; 2 Hawkins, c. 25, s. 59; Starkie, 73; 1 Chitty, C. L., 168, 129; 2 Gabbett, 198; Wharton, C. P. & P. § 166; 1 Bishop, C. P. § 506, 507; Gould, 71; Rex *v.* Horne, Cowper, 682; U. S. *v.* Mills, 7 Peters, 142; U. S. *v.* Cruikshank, 92 U. S. 544; Biggs *v.* People, 8 Barb. 550; State *v.* Stimson, 4 Zabr. 25.

3. "If any fact or circumstance which is a necessary ingredient in the offence be omitted, such omission vitiates the indictment. * * * Any fact or circumstance laid in the indictment which is not a necessary

Assimilated to the Indictment. In these particulars, and especially in the second, the Charge resembles the Indictment. These requisites, therefore, will be better understood by a reference to those rules for the framing of indictments which are most apposite to military pleadings. Our law indeed has prescribed no specific form for the Charge in the case of any offence,[1] and for this reason, and because a succinct directness in diction, as well as in action, is of the essence of the military system, the Charge is very much briefer, simpler, and less technical than is the Indictment.[2] But in cases of difficulty and importance, the criminal indictment will always be the model of the careful military pleader, both for the statement of essentials and their orderly and logical[3] arrangement.

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ingredient in the offence may be rejected as surplusage." 2 Hale, 187, note 7. "The want of a direct allegation of anything material in the description of the substance, nature, or manner of the crime, cannot be supplied by any intendment or implication whatsoever." 2 Hawkins, c. 25, s. 30. "Every fact which is an element in a *prima facie* case of guilt must be stated; otherwise there will be at least one thing which the accused person is entitled to know, whereof he is not informed." 2 Bishop, C. P. § 519. And see 1 Chitty, Pleading, 228.

1. VII Opins. At. Gen., 603; Kennedy, 69.

2. "A specification does not need to possess the technical nicety of indictments at the common law. Trials by court-martial are governed by the nature of the service which demands intelligible precision of language, but regards the substance of things rather than their forms. * * * Hence undoubtedly the most bald statement of the facts alleged as constituting the offence, provided the legal offence itself be distinctly and accurately described in such terms of precision as the rules of military jurisprudence require, will be tenable in court-martial proceedings, and will be adequate groundwork of conviction and sentence." Cushing, VII Opins., 604. "The charge or charges are, properly speaking, an indictment, and must, in their *substance*, possess all its essential requisites, although in *form* the military judicial procedure is less fettered by peculiar and customary solemnities of expression than the civil." Tytler, 209. And see Remarks of J. A. Gen. Sutton, in Col. Quentin's Trial, p. 81; O'Brien, 232; De Hart, 285, 287. In some instances the form of the indictment has been closely followed in military charges. Note a pointed example in an elaborate and technical specification under a charge of Manslaughter, in G. O. 20, Fifth Mil. Dist., 1868.

3. "All pleading is essentially a logical process." In analyzing a correct pleading, "if we take into view, with what is expressed, what is necessarily supposed or implied, we shall find in it the elements of a *good syllogism*." Gould, 4.

II. RULES FOR FRAMING THE CHARGE DERIVED FROM THE LAW OF INDICTMENTS.

The Charge to be Certain. "An important requisite in all pleading," says Gould,[1] "is *certainty*." This requisite, he adds, "implies that the matter pleaded must be clearly and distinctly stated, so that it may be fully understood by the adverse party, the counsel, the jury and the judges." Stephen[2] writes:—"It" (the pleading,) "must be particular or specific, as opposed to undue generality." This rule, Archbold[3] remarks, is especially to be observed with the *gist* of the pleading; matters of *inducement* or explanation, for instance, not calling for the same precision. It is further well said in this connection by Stephen[4]:—"To combine with the requisite certainty and precision the greatest possible brevity, is now justly considered as the perfection of pleading."

But this authority[5] subjoins the qualification that—"No greater particularity is required than the nature of the thing pleaded will conveniently admit." Or, as it is expressed by Archbold[6]—"Where the offence cannot be stated with complete certainty, it is sufficient to state it with such certainty as it is capable of." And by the former writer the further exception is mentioned,[7] that—"Less particularity is required when the facts

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1. Page 71. And see 2 Hawkins, c. 25, s. 71, 74; 1 Chitty, P., 169; 2 Gabbett, 197, 227; Wharton, C. P. & P. § 151, 166; 1 Bishop, C. P. § 323; U. S. *v.* Mills, 7 Peters, 142; State *v.* Stimson, 4 Zabr. 25. In the last case the court say:—"But the particularity required is not such as to screen the offender from conviction, or to embarrass the prosecution with useless technicalities."

2. Page 132.

3. Page 88, note 1. And see 2 Gabbett, 199, 236; Stephen, 132; Wharton, C. P. & P. § 165. The classification by Gould, (p. 141,) of the averments in civil, applicable also to criminal, pleadings, may be noted in this connection, as follows:—"All facts alleged in good pleading consist either, 1, of the *gist*, or substance, of the complaint or defence; or, 2, of matter in *inducement*," (*i. e.* introduction or explanation,) "or, 3, of matter of *aggravation;*" everything else, he adds, being "*surplusage*."

4. Page 422.

5. Page 367.

6. Page 88, note 1.

7. Page 370. An indictment need not negative what is matter of defence. 1 Bishop, C. P. § 638; U. S. *v.* Stevens, 4 Wash. 547. "In

lie more in the knowledge of the opposite party than of the p pleading."

The rule as to *certainty* is, as a general principle, applicabl the military Charge in the same manner as to the criminal inc ment or declaration of the civil practice,[1] and will properl observed in framing specifications. Because, however, of exceptional authority possessed by courts-martial in their f ings,[2] of correcting errors and imperfections of detail in speci tions, by substituting the true item or term, as indicated by testimony, for the uncertain or incorrect one originally inser a military pleading will more readily admit of an uncertain st ment, (in an allegation, for example, as to amount, num quantity or other particular of description,) than will an inc ment.

Not to Contain Surplusage. Strictly, any allegation i Charge, not properly required for the due and full statemen the offence, is surplusage.[3] Stephen,[4] in laying it down t surplusage, which he defines "unnecessary matter of whate description," is to be avoided, divides it into—(1) "matter wh foreign," and (2) "matter which, though not wholly foreign, d not require to be stated." Military writers also condemn "superfluous" or "extraneous" matter,[5] which is howeve be distinguished from matter of inducement or aggravati

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general, all matters of defence must come from the defendant, and n not be anticipated or stated by the prosecutor." 1 Chitty, P., 231. In Ralph Bovy's Case, 1 Ventris, 217, Chief Justice Hale is quote saying of the allegation of matter which should come more prop from the other side:—"'Tis like leaping before one come to the stil

[1] See Tytler, 209, 214; Kennedy, 69; O'Brien, 234; De Hart, While the general rules of pleading are substantially the same in criminal and the civil procedure, the practice of the courts is to req greater strictness in criminal than in civil pleadings; and in the for greater strictness in indictments for the graver, especially the cap crimes than in those for mere misdemeanors. 1 Bishop, C. P. §

Military offences," says Kennedy, (p. 73,) are, "with a few rare exceptions, of the nature of misdemeanors."

[2] See Chapter XIX.

[3] See Gould, 41, 142; 1 Chitty, P., 173; 2 Gabbett, 200; Whar C. P. N. P. § 158, 1 Bishop, C. P., Ch. XXXII.

[4] Page [illegible]

[5] Griffiths, 61, Hughes, 143; Macomb, 26; O'Brien, 234-5; Hart, 100

Mere surplusage will always be carefully winnowed out of his pleading by the careful draftsman. If allowed materially to encumber a specification, it may prove a source of considerable embarrassment to a court-martial, in bewildering the issue, and particularly in raising in their minds a question whether *proof* of such matter, in whole or in part, may not be called for. In point of fact, however, surplusage never requires to be proved, and is not to be taken into consideration by the court in their findings or judgment. In the civil practice, it is often, where wholly foreign, stricken out on motion. But if left to form a part of a pleading or Charge, it cannot affect its legal validity, since *utile per inutile non vitiatur.*[1]

Not to be Repugnant or Inconsistent. That is to say, that the material portions of the Charge are not to be opposed in meaning or effect, or to contradict each other. This rule is repeated by all the principal authorities, civil and military.[2] It is an important one, since a failure to observe it may result in nullifying the Charge, or at least the specification in which the repugnancy occurs.[3]

Nor Ambiguous. That is to say, the Charge must not contain allegations of which the meaning is obscure or equivocal, and which are susceptible of different interpretations.[4]

Nor Argumentative.[5] Or, as it is expressed by Stephen[6]—pleadings "must advance their positions of fact in an absolute

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1. See Stephen, 424; Gould, 142; 1 Bishop, C. P. § 440, 478.

2. Stephen, 377; Gould, 144; Starkie, 273; 1 Archbold, 91; 1 Chitty, P., 173, 231; 2 Gabbett, 199, 235; Wharton, C. P. & P. § 256; 1 Bishop, C. P., Ch. XXXIV; Hough, 41; Kennedy, 76; De Hart, 287.

3. "Repugnancy is two inconsistent allegations in one pleading. As both cannot be true, and there is no means of ascertaining which is meant, the whole will be as though neither existed." 1 Bishop, C. P. § 489. "It takes off much from the credit of an indictment that those by whom it is found have contradicted themselves." 2 Hawkins, c. 25, s. 62.

4. Stephen, 378; 1 Chitty, C. L., 231; 2 Gabbett, 200; 1 Bishop, C. P. § 510. But "where a matter is capable of different meanings, that will be taken by the court which will support the proceedings, not that which would defeat them." Chitty, 231.

5. "The object being to communicate facts and not reasons, an argumentative form of expression, obscuring the facts, is not adequate." Bishop, C. P. § 508. And see Gould, 55; Kennedy, 76.

6. Page 384.

form, and not leave them to be collected by inference and argument only."

Matter of Evidence not to be Stated.[1] It is not good pleading, in alleging a fact, to state the circumstances proving or tending to prove its truth.[2] Such are the acts, occurrences and matters of description which should properly form part of the testimony of the witnesses. Such indeed are *some* matters of aggravation, although such matters are to a reasonable extent allowed to be recited and are not unfrequently added in a military Charge.[3] But, strictly, the only facts apposite to be stated are those constituting the offence in law. Where, however, the Charge is of a general character, as where it is laid under the 61st or the 62d Article, the circumstances, and matters of inducement and aggravation, surrounding the alleged punishable act of the party are often required to be more fully set forth than in the case of one of the exact offences, and the rule against pleading matters of evidence is not to be so rigorously applied.[4]

Nor Matter of Law. Any statement of the law, or of conclusions or presumptions of law, is altogether out of place in a good pleading.[5] As it is observed by Gould[6]—"Judges are

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1 Stephen, 342; 1 Chitty, C. L., 231; U. S. v. Bachelder, 2 Gallison, 15.

2 Stephen, 342. This author adds, p. 346, that this rule tends perhaps more than any other to prevent "minuteness and prolixity of detail."

3 The statement of the law by O'Brien, p. 234, that—"All aggravating circumstances of the guilty act must be alleged in the specification, or they cannot be put in evidence, is, of course, erroneous.

4 As a kindred rule to that excluding matters of evidence, may be noted here the one given separately by Stephen, p. 353, that—"It is not necessary to allege circumstances necessarily implied."

5 [illegible] 1 Chitty, C. L., 231; 2 Gabbett, 199, 229; [illegible] 515; Rex v. [illegible] Whart. Prec. 1061, [illegible] and never has been, to charge [illegible] as justly inferential from the [illegible] on the record. You may not [illegible] general phrases. You [illegible] the particular case." In [illegible] which the constituents are simple and general [illegible] is not strictly observed, as in cases of [illegible] See [illegible]

6 Page [illegible]

always presumed to know judicially what the law is; and have therefore no occasion to be informed of it by the pleadings." As to conclusions of law, it is the business of the court to make these for itself, deducing them from the facts as they are stated and appear in evidence. To assume to express such conclusions in a Charge or indictment is irrelevant and impertinent.

Nor Matters of which the Court will take Judicial Notice, ex officio. It is remarked by Stephen[1] that, "besides points of law, there are many other matters of a public kind of which the court takes official notice, and with respect to which it is, for the same reason, unnecessary to make allegation in pleading." Such are—the law of nations; the provisions of the Constitution, public statutes, executive proclamations, and, in the military practice, the formal General Orders, circulars, and other publications to the army emanating from the War Department; the political frame-work, officers and operations of the government; matters of public history; the powers of the President and heads of departments; the "established and usual course" of the proceedings of Congress; the main geographical features and the local divisions of the country; the "meaning of words in the vernacular language;" the "course of time;" the "legal weights and measures;" the current coins and other circulating medium.[2] "In fine," adds Greenleaf,[3] "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." All matters of this description, therefore, do not need to be alleged, or enlarged upon, as facts, in the pleading or Charge; such allusion to them as will indicate what is meant or referred to being all that is necessary.[4]

Statement of Name, Office, Rank, &c. The name of the accused should be given with such particularity as to identify him and distinguish him from any other person.[5] It is held by

1. Page 349. And see 1 Chitty, C. L., 231.
2. See 2 Hawkins, c. 25, s. 100; Stephen, 347–349; 1 Greenl. Ev. §§ 5, 6.
3. 1 Ev. § 6.
4. Stephen, 348.
5. See Stephen, 301; Starkie, 49, 203; 1 Chitty, C. L., 202; 1 Archbold, 78; Wharton, C. P. & P. § 96.

the U. S. Supreme Court,[1] and generally by the courts of the States,[2] that the middle name is no part of the legal name, and may be omitted in stating it. The good pleader, however, will prefer to add it, or its initial, if within his knowledge; and it must be added where necessary to distinguish the person. Where the accused is known by two names, as in a case of a soldier re-enlisting under an assumed name in violation of the 50th Article of war, and it is doubtful which name is his true one, he may be distinguished by either, the other being added under an *alias*.[3] The rank, office, regiment, corps, capacity, &c., of the accused are, by invariable usage, set forth in a military pleading, and should always be added whether the accused be an officer or enlisted man, or a retainer, camp-follower, &c.[4] If no military rank, office, or employment were given, the presumption would be that the party was not within the jurisdiction of a court-martial. Where since the date of his alleged offence the accused has been promoted, he should properly be designated at the commencement of the specification as of his present rank, but in describing the commission of the offence, the rank which he held

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1. "The law knows of but one Christian name, and the omission or insertion of the middle name, or of the initial letter of that name, is immaterial." Games *v.* Stiles, 14 Peters, 327. And see Keene *v.* Meade, 3 Peters, 7; Lessee of Dunn *v.* Games, 1 McLean, 321; also II Opins. At. Gen., 332; III Id., 467.

2. Hart *v.* Lindsey, 17 N. H. 235; Franklin *v.* Tallmadge, 5 John. 84; Roosevelt *v.* Gardiner, 2 Cow. 463; Bratton *v.* Seymour, 4 Watts 329; Price *v.* State, 19 Ohio, 53; State *v.* Martin, 10 Mo. 361; State *v.* Williams, 20 Iowa, 98; Erskine *v.* Davis, 25 Ills. 251; State *v.* Manning, 14 Texas, 402; People *v.* Lockwood, 6 Cal. 206, &c.

"Junior," or "Jr.," is no part of the legal name. 1 Bishop, C. P. § 687, and cases cited.

3. See Simmons § 390; and compare 1 Chitty, C. L., 203; 2 Gabbett, 214, 217; Wharton, C. P. & P. § 99, 103; 1 Bishop, C. P. § 681.

4. Tytler, 214; Kennedy, 70; Simmons § 388; G. O. 22, Army of the Potomac, 1861. It is never necessary in a military charge to set out the fact of the appointment or commission of an officer. "In an indictment against a public officer for a breach of duty, it is sufficient to state generally that he is such officer, without setting forth his appointment to the office." 1 Chitty, C. L., 231. In military charges it is not the practice even to state, by a direct allegation, that the accused, (or other officer referred to,) *is* such an officer; the description of the office being merely added, as a designation, to the name of the party—as "A. Captain, First Regiment of Infantry, United States Army;" or "Capt A. B., First Regiment," &c.

at the time should be stated.[1] As by the words—'he the said A. B. then being,' (specifying his former rank and office,) or in terms to such effect. And so, in the case of any other change in the military status, as of regiment, arm, corps, &c., which has intervened since the alleged criminal act. Errors, however, in the statement of rank, regiment, &c., are such as may be corrected by the court in the Finding.

Similar rules apply, though with less strictness, to the statement of the name, office, &c., of a person or persons injured, disobeyed, disrespectfully addressed, &c., by the accused,[2] or other party material to be mentioned in the pleading.[3]

Statement of Time and Place. While it is laid down as a general rule by the authorities that the *time*, (year, month, and day of the month,) and the *place*, of the alleged criminal act, should be stated with certainty, it is also held that, where not of the *essence* of the offence, the *precise* day and *exact* locality of its commission are immaterial and need not be averred; it being sufficient simply to allege a time and place within the jurisdiction of the court.[4] In military charges there is still greater margin allowable, since the *place* or region of jurisdiction is much more extensive than that of the county, district, State, &c., to which the jurisdiction of the criminal courts is limited. Thus if a specification to a military charge is so framed as to advise the accused of the particular act of offence intended to be alleged, and enable him to plead a former conviction or acquittal if subsequently brought to trial on account of the same act, it will be strictly sufficient in law if it set forth a *time* within the limitation of Art. 103, and a *place* within the United States,[5] (or within

1. See III Opins. At. Gen., 548. The mere fact, however, that the rank of the accused is misstated does not vitiate a specification, if there is no question as to the identity of the party. G. O. 38, Army of the Potomac, 1863.

2. G. C. M. O. 61, Dept. of the Mo., 1871. And compare State *v.* Irwin, 5 Blackf. 343; Wharton, C. P. & P. § 109.

3. See Butler *v.* State, 5 Blackf. 280. If not known by name, the party may be described as a "certain person unknown." 1 Bishop, C. P. § 378; Wharton, C. P. & P. § 111.

4. 1 Chitty, C. L., 224; 1 Archbold, 85; Stephen, 392; Wharton, C. P. & P. § 120, 139; 1 Bishop, C. P. § 375, 386; U. S. *v.* Burch, 1 Branch, C. C. 37; Johnson *v.* U. S., 3 McLean, 89; McBryde *v.* State, 1 Ga. 203.

5. "The Secretary of War directs that it be announced to the Army,

the territory of a foreign country when, by reason of war or o wise, the army is authorized to be there.[1])

But this latitude need rarely be availed of, and it is al desirable that the time and place should be stated *exactly*, nearly so as practicable. Where they are not precisely kn it is the practice to describe the offence as having been comm "on or about" a certain date and "at or near" a certain loc named; the date and locality specified being the nearest a tainable.[2] Where the offence is one which has been comm from one day to another, or commenced on one day and pleted on another, it may properly be alleged in the specific to have been committed on or between certain days named; if these days are so far apart that the offence intended t charged cannot reasonably be distinguished, the pleadin defective, and, upon exception taken by the accused, by m to strike out,[4] or otherwise, should be required by the cou be amended.[5]

In some cases the offence committed is of a *continuing* acter, extending over a considerable period of time and exhib

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for the information and guidance of courts-martial, that although i specification to charges, time and place ought to be laid with as certainty and truth as may be practicable, still it is *sufficient in l* prove the offence to have been committed at any other place and within the jurisdiction of the court." G. O. 16 of 1853. And see mons § 394; De Hart, 288; DIGEST, 150–1. And compare I C At. Gen., 295–6, (Lieut. Gassaway's Case.) That time and place not be strictly *proved* as laid, see G. O. 6, Dept. of Utah, 1861; D First Mil. Dist., 1867; DIGEST, 152.

1. See Chapter VIII.

2. Simmons § 394; Harcourt, 115; Macomb, 25; O'Brien, De Hart, 291; DIGEST, 151. These alternative forms would pro not be regarded as admissible by the criminal courts. See U. Crittenden, Hemphill, 61.

3. DIGEST, 151–2. And see Simmons § 394; 1 Bishop, C. P. § 397.

4. See Chapter XVI.

5. DIGEST, 152. And see cases in G. O. 193, Dept. of the Pot 1862; Do. 98, Dept. of N. Mexico, 1862; Do. 36, Dept. of the 1863. In Capt. Trenor's Case, published in G. O. 4 of 1842, t cused was charged with drunkenness on duty between Sept. 15 Dec. 31st, 1840, and objected to the specification as including "s length of time as to prevent the possibility of either disproving it fending himself against it." His objection was sustained by the and the charge and specification were "accordingly thrown out." proceedings were approved by the President.

a general habit or course of conduct. In such cases, where distinct acts cannot readily be separated and attributed to particular dates, it is allowable to charge the misconduct in form somewhat as follows: 'This during (or in) the months of ———,' (specifying the particular months or other periods.[1]) Such pleading, however, is unfrequent in practice, and not to be favored where it can well be avoided.

As it has been held by the Judge Advocate General, the allegations of time and place may be *omitted altogether*, without affecting the legal validity of the proceedings or sentence, provided the same sufficiently appear from the testimony in the record.[2] Such an omission, however, would be negligent and hazardous, and is now of rare occurrence.[3]

The *hour* of the day or night at which a certain alleged act took place need never be specified, unless part of the gist or essence of the transaction upon which the charge is based.[4] Thus, in a charge against a soldier for sleeping on his post as a sentinel, it will generally be desirable, as more accurate, to designate at what hour, or between what hours, he was found asleep, in order to identify the time with that of his regular turn of duty.[5]

Statement of Quality, Quantity, Number, Kind, Value, &c. Especially where a party is charged with the larceny, embezzlement, &c., of property, it is proper that the quality, quantity, number, kind, value, denomination, &c., of the moneys or articles stolen, appropriated, &c., should be specified sufficiently clearly to identify the same,[6] although the utmost exact-

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1. See a recent instance in G. C. M. O. 10 of 1878.

2. DIGEST, 152; G. O. 64, Middle Dept., 1863; Do. 57, First Mil. Dist., 1867.

3. See G. C. M. O. 42, Dept. of Texas, 1875, where, no date being given in the specification, and none appearing in the testimony, the proceedings were disapproved.

4. "It is not necessary to mention the hour in the indictment; except perhaps in cases of *burglary*, where it is usually laid for the purpose of showing with more certainty that the offence was committed in the night-time and not during the twilight." 2 Gabbett, 222.

5. See Simmons § 394.

6. Stephen, 296; Starkie, 218; 1 Chitty, C. L., 235; 2 Gabbett, 232; Wharton, C. P. & P. § 206; 1 Bishop, C. P. § 576.

ness is not required.[1] The *value* of the property stolen is particular held especially essential to be stated in an indictm for larceny; since "in order to make the stealing of any arti larceny at the common law, it must be proven to be of so value."[2] In a military charge there is not the same necess for accuracy in the statement of quantity, number, or amou since the court in its Finding can always rectify the item acco ing to the testimony. As to value, a specification which omit to assign a value to an article alleged to have been the subject larceny would not be held defective if the article were such presumably to be of some value, at least to the owner. T value of stolen property is in fact frequently omitted to be sta in a military charge. It should be alleged, however, if only the purpose of assisting the court in determining whether t accused, upon conviction, may, (in view of the law of the Sta &c., as to the punishment,) be sentenced to imprisonment i penitentiary under Art. 97 of the code.

Statement of Writings. A writing may, ordinarily, be out *verbatim* or in substance only. But where its terms en into the very gist of the offence, as in the case of an instrum alleged to have been *forged*, a precise copy should be inserted practicable.[3] So, in all cases where, although it may not necessary to give it, a copy is professed to be exhibited, it sho

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1. See under the rule as to Certainty, *ante*, that only such particula is required as the nature of the subject reasonably admits of.

2. State *v.* Tillery, 1 N. & McC., 11. "It is necessary that so specific value should be assigned to whatever articles are charged as subjects of larceny. An indictment cannot be sustained for stealin thing of no intrinsic or artificial value." Wharton, C. P. & P. § 2 The *ownership* of property or money stolen or embezzled should be set forth. 1 Bishop, C. P. § 581, 582, &c. Where the name of owner is unknown and cannot be ascertained, he may be referred to a 'person unknown.'

3. Wharton, C. P. & P. § 167; 2 Bishop, C. P. § 403. "Where only of the written instrument is included in the offence, that part al is necessary to be set out." De Hart, 293. "In stating a libel or jury, it is necessary only to set forth so much of the matter as ren the offence complete, provided the part omitted does not in any alter the sense of that which is set out." 1 Chitty, C. L., 235. In indictment for perjury it is only essential to set forth the substanc the oath, or that portion in regard to which the perjury is allege have been committed. People *v.* Warner, 5 Wend. 271; Campbe People, 8 Id. 638.

of course be a copy, *i. e.* in the exact words of the original.[1] If a writing essential or desirable to be set forth literally has been lost or destroyed, or is in the possession of the accused, the fact will properly be averred by way of explanation of its non-statement, and its substance be given as nearly as practicable.[2] So, where its contents are indecent and improper to be recited, this should be explained, the substance and effect of the paper being at the same time presented. A writing, of which the original is expressed in a foreign language, should in general be given in English, with an averment to the effect that the version is a translation.[3] When the substance or purport only of a writing is stated, its terms should be expressed according to their legal effect; that is to say as they operate or take effect in law.[4] In military charges, where the writing is of a brief and simple character—as in the case of a general or special order alleged to have been disobeyed by the accused, or an official communication alleged to be disrespectful, &c.—it is preferable to recite it in full. Where the writing is more elaborate, or contains an extended array of figures or other details, its substance or material

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1. A copy in pleading is usually introduced by some such expression as—"in these words;" "as follows, viz;" "in the words and figures following, to wit;" "of which the following is a copy;" or, more technically, "in tenor following;"—the term *tenor* being employed in pleading to indicate a transcript of the original instrument, in contradistinction to *substance* or *purport*. When the substance only of the writing is to be set out, the ordinary introduction is—"in substance as follows, viz;" "to the effect," (or "purport,") "following namely, that," &c. See 1 Chitty, C. L., 233; 2 Gabbett, 201; Wharton, C. P. & P. § 168–170; 1 Bishop, C. P. § 559–561, and cases cited. "*Marks of quotation* used in an indictment for libel, to distinguish the libellous matter, are not sufficient, *per se*, to indicate that the words thus designated are the very words of the alleged libel." Com. *v.* Wright, 1 Cush. 64.

2. Wharton, C. P. & P. § 176.

3. See 1 Chitty, C. L., 175, where is stated the general rule that indictments, which were at an early period written in Latin, "must be in English." Hale, (2 P. C., 169,) writing about the middle of the seventeenth century, says:—"Regularly every indictment ought to be in Latin, as all pleadings in the courts of law ought to be; and it is of excellent use because, it being a fixed regular language, it is not capable of so many changes and alterations as happen in vulgar languages." In Rex *v.* Goldstein, R. & R., C. C., 473, an indictment for the forgery of a Prussian treasury note, not containing a translation of the same, was held defective.

4. Stephen, 389; U. S. *v.* Keen, 1 McLean, 441.

portion only will preferably be set out.[1] The original or a copy may however be appended to the Charge, a reference to the same as thereto annexed and forming part of the Charge being made in the specification:[2] this arrangement however is rare in the military practice.

Statement of Words Spoken. The authorities are quite strict in holding that spoken words, (where not too indecent, in which case their substance may be given,[3]) should be literally set forth in an indictment, when their character and effect—as that they are defamatory, scandalous, blasphemous, &c.—is the gist of the accusation.[4] Similarly in a military charge such words should be recited as uttered, or as nearly so as practicable. Thus a specification to a Charge under Art. 19, or Art. 20, which averred merely that the accused used disrespectful language against the President, or toward his commanding officer, without stating the words or at least their substance, would be defective, and the court, upon exception taken, would properly require it to be amended.

Statement of Statutory Offences. In setting forth in an indictment an act made an offence by statute, the *strict* rule requires that the words of the description should be closely followed;[5]

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1. Thus, in charging the offence of procuring a double payment, the pay account need not be set forth in full, though this has sometimes been done.

2. Com. *v.* Tarbox, 1 Cush. 72.

3. See Bombay R., 2, 3; also instances in G. O. 6, Dept. of Utah, 1861; Do. 32, Div. Atlantic, 1878.

4. 2 Hawkins, c. 25, s. 59; 2 Gabbett, 232; Wharton, C. P. & P. § 203. In Rex *v.* How, Strange, 699, it was held that it was not sufficient to allege that the defendant used scandalous, threatening and contemptuous words against a magistrate, but that the words themselves must be set out. In Rex *v.* Popplewell, Id. 686, the report is—"Conviction for profane cursing and swearing was quashed for want of the particular oaths and curses being set out."

5. 1 Chitty, C. L., 281; 2 Gabbett, 239; Wharton, C. P. & P. § 220; 1 Bishop, C. P., Ch. XXXIX. "Where the words of the statute are descriptive of the nature of the offence, the indictment must follow the very words, and expressly charge the offence upon the defendant." State *v.* Gibbons, 1 South. 51. "It is a general rule that all indictments upon statutes, *especially the most penal*, must state all the circumstances which constitute the definition of the offence in the Act, so as to bring the defendant precisely within it." State *v.* Foster, 3 McC. 444. "If a part of the description of the offence consists of a

and it is always *sufficient*,[1] and safest, to so follow them. It has been held, however, in some of the U. S. courts that the *exact* language of the statute need not be employed, provided the description be adopted with a substantial accuracy.[2]

As all military offences are statutory offences, this rule, (with its qualification,) applies directly to military charges; but the Articles of war, under which nearly all such charges are laid, are so brief, and so simple in their terms, that there is in general no difficulty in framing allegations to meet their provisions. The only two points ruled upon by the authorities in this connection which need be noted here are, (1) that when the Article or other statute specifies an exception or exceptions to its general operation, it will in general be proper to negative the same in describing the offence in the specification;[3] and, (2) that where the Article or other statute enumerates two or more similar forms of offence or phases of the same offence in a disjunctive form, they should, (if averred together,) be averred conjunctively;[4] or, in other words, where criminal acts, which may be imputed in the same count or Charge without duplicity, are stated in the disjunctive in the statute, they should, if pleaded together, be ex-

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negative proposition, it is as necessary in an indictment for that offence to state the negative as the affirmative part of the description." U. S. *v.* McCormick, 1 Cranch, C. C., 598.

1. U. S. *v.* Armstrong, 5 Philad. 277; People *v.* Taylor, 3 Denio, 93. And see U. S. *v.* Mills, 7 Peters, 142; State *v.* Abbott, 11 Foster, 434.

2. See U. S. *v.* Bachelder, 2 Gallison, 18; Do. *v.* Deming, 4 McLean,

3. Hawkins, (vol. 2, c. 25, s. 100,) mentions, as a good reason for not requiring the highest exactness in the statement of statutory offences, that—"the judges are bound *ex officio* to take notice of all public statutes." And see 1 Bishop, C. P. § 608.

3. "If there be any exception contained in the same clause of the statute which creates the offence, the indictment must show negatively that the defendant, or the subject of the indictment, does not come within the exception. If the exception or proviso be in a subsequent clause or statute, or although in the same section, yet if it be not incorporated with the enacting clause by any words of reference, it is, in that case, matter of defence for the other party, and need not be negatived in the pleading." Monthly Law Reporter, 6 N. S., 77. And see U. S. *v.* Pond, 2 Curtis, 85; Com. *v.* Maxwell, 1 Pick. 141; 1 Ben. & Heard, L. C. C., 250, notes.

4. Stephen, 386; 2 Gabbett, 200; Gould, 55, note; Wharton, C. P. P. § 161, 162; 1 Bishop, C. P. § 585, 586; Rex *v.* Stocker, 1 Salk. 12; Rex *v.* Middlehurst, 1 Burr, 399; U. S. *v.* Almeida, Whart. Prec. 61, note: State *v.* Morton, 27 Verm. 310; State *v.* Price, 6 Halst. 3; Raswick *v.* Com., 2 Va. Cas. 356; Kirby *v.* State, 1 Ohio St. 185. Where a statute, defining crimes and prescribing their punishment,

pressed in the conjunctive form.[1] This point will be further illustrated in treating of "double" pleading.

Statement of Intent. It is laid down, generally, by Chitty,[2] that—"where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment." But in military cases the intent of an act need not be added to the statement of its commission, unless required to be by the terms of the statute on the subject, or, in other words, unless the article or other statute creating and describing the offence makes the intent, in terms, an element of the criminal act.[3] Thus Arts. 3, 5, 8, 14, 15, 16, 27, 45, 50 and 59 declare that if officer or soldier, as the case may be, "knowingly," or "wilfully," or "knowingly and wilfully," commit a certain act, he shall be amenable to trial and punishment. So, in Art. 60, the terms "knowing," "knowingly," "knowingly and wilfully," "wrongfully and knowingly," and "with intent to defraud," are employed as indicating the purpose with which the different acts denounced must be committed to constitute them offences within the law. In all these instances the *intent* should properly be expressly averred in the Charge, and in the word or words in which it is designated in the statute. On the other hand, in cases of crimes which in their very nature involve a malicious or wrongful intent, as those of manslaughter, robbery, larceny, rape, perjury, &c., specified in Art. 58, or chargeable, (when directly prejudicing the service,) under Art. 62, while the common law form of indictment may be followed, it is allowable to charge the offence simply by its name, without employing in the specification words expressive of the intent, as "wilfully," "maliciously," "feloniously," or the like.

Different Statements of Same Offence. It is laid down by Chitty[4] that—"It is frequently advisable, when the crime is

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describes disjunctively under a single head certain offences which are of such a character that a single transaction may include the commission of one or of more than one of them, a count of an indictment charging them conjunctively may be sustained by proof of the commission of only one of them." U. S. *v.* Armstrong, 5 Philad. 273.

1. The 60th Article of war is the most conspicuous *military* statute of the class indicated.

2. C. L., 233.

3. See Simmons § 407; De Hart, 295; G. O. 28 of 1859.

4. 1 C. L., 248.

of a complicated nature, or it is uncertain whether the evidence will support the higher and more criminal part of the charge, or the charge precisely as laid, to insert two or more counts in the indictment." And Wharton[1] writes—"Every cautious pleader will insert as many counts as will be necessary to provide for every possible contingency in the evidence; and this the law permits." In military cases where the offence falls apparently equally within the purview of two or more articles of war, or where the legal character of the act of the accused cannot be precisely known or defined till developed by the proof, it is not unfrequent in cases of importance to state the accusation under two or more Charges.[2] If the two articles impose different penalties, it may, for this additional reason, be desirable to prefer separate charges, since the court will thus be invested with a wider discretion as to the punishment. Where, however, the case falls quite clearly within the definition of a certain specific article, to resort to plural charges is neither good pleading nor just to the accused. At most, in such cases, a single additional charge under Art. 62 should in general suffice. An unnecessary multiplication of forms of charge for the same offence is always to be avoided.[3] In view of the peculiar authority of a court-martial to make corrections and substitutions in its Finding, and to convict of a breach of discipline where the proof fails to establish the specific act alleged, the charging of the same offence under different forms is much less frequently called for in the military than in the civil practice.

Rule as to Duplicity. An indictment or count in which two or more separate and distinct offences, whether of the same or a different nature, are set forth together is said to be *double*, and such a pleading is bad on account of *duplicity*.[4]

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1. C. P. & P. § 297. And see 1 Archbold, 93; Com. *v.* Webster, 5 Cush. 321.

2. "The commander who prefers a charge may, in the exercise of a just and legal discretion, when the act may fall under different articles of war, elect under which to charge it, or may charge it variously as in the several counts of an indictment." G. O. 18 of 1859.

3. See G. O. 19, Dept. of the Columbia, 1872; G. C. M. O. 95, Div. Pacific & Dept. of Cal., 1881.

4. 1 Chitty, C. L., 253; Starkie, 271; 1 Archbold, 95; Stephen, 251, 262; 2 Gabbett, 201, 234; Gould, 389; Wharton, C. P. & P. § 243; 1 Bishop, C. P., Ch. XXVIII; also Hough, (Practice,) 40; Simmons § 401; Griffiths, 61; De Hart, 298; DIGEST, 150.

This rule, however, does not apply to the stating together, in the same count, of several distinct criminal acts, provided the same all form parts of the same transaction and substantially complete a single occasion of offence. Thus it has been held that assault and battery and false imprisonment, when committed together or in immediate sequence, may be laid in the same count without duplicity, since "collectively they constitute but one offence."[1] So it is held not double pleading to allege in the same count the larceny of several distinct articles appropriated at the same time and place.[2]

A further description of cases is to be noted as not within the rule, or as constituting an exception to the rule,—*viz.* cases of *statutory* offences or phases of offence of the same nature, classified in the enactment as of the same species and made similarly punishable. In a case of this class it was observed by a U. S. court[3] that the several criminal acts indicated may be regarded as "representing each a stage in the same offence, and therefore properly to be coupled in one count."

This was a case which arose under a statute of March 3, 1825, which provided that any person who should "secrete, embezzle, or destroy a mail of letters," should be subject to a certain punishment: it was held that a count, alleging that the defendant "did secrete and embezzle" a mail, was not bad for duplicity.[4] In the further case of U. S. v. Armstrong,[5] the defendant was accused of a violation of an Act of March 3, 1823, in which it was declared that any one who "shall transmit to, or present at, or cause or procure to be transmitted to or presented at, any office or officer of the United States, any * * * writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, * * * forged," &c., shall be punished as for a felony with fine and imprisonment. The count charged the defendant with "transmitting to and presenting at, and causing and procuring to be transmitted to and presented at, the office of the Commissioner of Pensions

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1 Francisco v. State, 4 Zabr. 30.

2 State v. Williams, 10 Humph. 101; Lorton v. State, 7 Mo. 55; Whartons C. P. & P. § 252. And see case in DIGEST, 150 § 15.

3 U. S. v. Sander, 6 McLean, 600.

4 And see U. S. v. Mills, 7 Peters, 142; U. S. v. Bachelder, 2 Gallison, 15.

5 Ibid. 273.

a forged writing, for the fraudulent purpose of obtaining a soldier's bounty land, though the only act of the defendant was putting the forged letter with the guilty purpose into the post office at Philadelphia, directed to the Commissioner of Pensions at Washington." The indictment was held good by Grier, J.[1]

This latter case has been the more fully cited as being peculiarly apposite to the subject of the framing of military charges under the statute of March 2, 1863, now incorporated in the military code as the 60th Article of war; the same being *in pari materia* with the said enactment of 1823, which was indeed its original in our legislation. Upon the principle illustrated by the cases cited, the similar criminal acts specified in the separate paragraphs of Art. 60 may, in general, be joined in the same Charge without incurring the fault of duplicity. Thus it may be alleged that the accused did make and cause to be made, and present and cause to be presented, for payment, a claim, &c., knowing the same to be fraudulent, &c.; or did forge and counterfeit, and cause and procure to be forged and counterfeited, a signature, &c.; or did embezzle, and knowingly and wilfully misappropriate and apply to his own use, property of the United States, &c.[2]

The point under consideration is illustrative of the rule of pleading statutory offences heretofore considered, that, where acts which may be charged together without duplicity are expressed in the statute disjunctively, they should, when averred together, be expressed conjunctively; all the adjudged cases last cited being instances of conjunctive statements of matters of offence detailed in the disjunctive form in the enactment.

But notwithstanding the form of statement thus sanctioned, the careful military pleader will always preferably set forth *by itself* the form of the offence of the accused *where it can be clearly distinguished*, instead of coupling or blending it with another form in the same specification. Thus, if it is clear that the accused *personally* presented the claim alleged to be fraudulent,

1. See the similar ruling in the late case of U. S. *v.* Hull, 4 McCrary, 74, and compare State *v.* Haney, 2 Dev. & Bat. 403; Rasnick *v.* Com., 2 Va. Cas. 356; State *v.* Morton, 27 Vt. 310; Clifford *v.* State, 9 Wis. 327; Mackey *v.* State, 3 Ohio St. 362; Starkie, 246; 1 Bishop, C. P. § 586 and cases cited.

2. But the *stealing* made punishable in the same clause would not properly be charged conjunctively, (or disjunctively,) with *embezzlement*, the two being distinct offences in law.

he will properly and preferably be charged simply with presenting, and not with presenting and causing to be presented. If when the charges are preferred, it is doubtful whether the claim was presented personally or through another person, the offence may well be pleaded conjunctively according to the forms above cited.

It may be added that *double pleading*, consisting sometimes in joining two or more separate and distinct instances of the same offence, but more frequently in blending different specific offences, in one specification, has been a not uncommon fault in our service, and has been repeatedly condemned in Orders.[1]

It remains also to notice, under this head, the two minor points indicated by the authorities—that mere surplusage or immaterial matter cannot avail to make a pleading double;[2] while, on the other hand, matter which is material may have such effect though it be defectively pleaded.[3]

Joinder. Although a count of an indictment may not regularly charge more than one distinct and separate offence, it may, in a proper case, charge that offence against several defendants as having been committed by them conjointly. As it is laid down by the authorities,—"When more than one join in the commission of an offence, all, or any number of them, may be jointly indicted for it, or each of them may be indicted separately." * * * "There are some offences in which the agency of two or more is essential," and, in an indictment for which, "less than two cannot possibly be joined," as in conspiracy and riot. But whenever the offence is, in its nature, *several*, there can be no joinder.[6]

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1. See G. O. 3, 83, Dept. of the Mo., 1863; Do. 49, Dept. of the Ohio, 1864; Do. 9, Dept. of the Gulf, 1866; G. C. M. O. 80 of 1873; Do. 8, Dept. of Texas, 1873. The instances of this fault appear to have been more frequent and marked in the English service. See, for example, the cases in James' Collection, of Cornet Ashburnham, p. 113; Lieut. Duckett, p. 219; Ast. Surgeon Martin, p. 364; Ensign Gunter, p. 487, &c.

2. Stephen, 259; Gould, 142; 1 Bishop, C. P. § 440; State *v.* Palmer, 35 Maine, 9; Green *v.* State, 23 Miss. 509.

3. Stephen, 261. And see Gould, 142.

4. Starkie, 34; 1 Chitty, C. L., 255; 1 Archbold, 96; 2 Gabbett, 2; Wharton, C. P. & P. § 301; 1 Bishop, C. P., Ch. XXIX.

5. See Wharton, C. P. & P. § 305, 306; U. S. *v.* Cole, 5 McLean, 523; Com. *v.* Manson, 2 Ashm. 31; State *v.* Tom, 2 Dev. 574.

6. Starkie, 42; Wharton, C. P. & P. § 302. Thus two or more

The joining of several persons in one Charge though not unfrequent during the late war,[1] is not now common in the military practice, but may always be resorted to where a single act of offence has been committed by two or more soldiers or officers in concert and in pursuance of a common intent.[2] The Charge of "joining in a mutiny"—an offence made punishable by Art. 22 of the code—is that which presents the most frequent examples of joinder at military law. But the mere fact that several persons happen to have committed the same offence at the same time does not authorize their being joined in the Charge.[3] Thus where two or more soldiers take occasion to desert, or absent themselves without leave, in company, but not in pursuance of a common unlawful design and concert, the case is not one of a single joint offence, but of several separate offences of the same

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cannot be joined in an indictment for perjury. 2 Hawkins, c. 25, s. 89, note 1; Rex *v.* Phillips, Strange, 921. "Or for seditious or blasphemous words, or the like, because such offences are in themselves several." 2 Hale, 174, note 11. "Where the offence indicted doth not wholly arise from the joint act of all the defendants, but from such act joined with some personal and particular defect or omission of each defendant, without which it would be no offence, * * * the indictment must charge them severally and not jointly." 2 Hawkins, c. 25, s. 89. And see 2 Gabbett, 252. In U. S. *v.* Kazinski, 2 Sprague, 7, four parties were jointly indicted for "enlisting and entering" themselves as soldiers in the service of a foreign power, in violation of the neutrality act of 1818. It was held by Sprague J., that this was an offence "in which but one could have participated;" adding—"No one could be guilty of the offence of another person's enlisting himself, which was the offence in these counts charged. Each of these counts charged four persons jointly with an offence which by law is several only, and can under no circumstances be joint. These counts must be stricken out."

1. Among the most conspicuous instances were cases in the following Orders, where the number of the accused as joined in the charges and trials were as follows:—Eighteen in G. C. M. O. 6, Dept. of Ky., 1866; Twenty-one in G. C. M. O. 62, Dept. of Texas, 1873; Twenty-three in G. O. 175, Fifth Mil. Dist., 1869; Thirty-two in G. O. 38, Dept. of the Platte, 1867; Thirty-four in G. C. M. O. 521, War Dept. 1865.

2. DIGEST, 153; Kennedy, 73–4; Hough, (Practice,) 42; Simmons § 102; G. O. 78 of 1872. And see G. O. 10, Dept. of the Platte, 1871, where two soldiers were held properly joined in a Charge for an absence without leave committed together by previous deliberate concert; also Do. 26, Id., 1871, where was approved a Charge in which were joined three soldiers who had conspired to overthrow the guard and escape together from the guard-house, and succeeded.

3. DIGEST, 153.

character, which are no less *several in law* though committed at the same moment.[1]

Whether in a case in which there may properly be a joinder, the accused shall be charged and tried jointly or separately, is a question of discretion to be determined, upon considerations of convenience and expediency, and in view of the exigencies of the service, by the commander authorized to order the court. The mere fact that different measures of punishment will properly require to be awarded to the different parties, on conviction, can constitute no objection to their being jointly prosecuted.

Under what circumstances and in what manner accused persons jointly charged may procure themselves to be *severed* on the trial, will be indicated in a subsequent chapter.[2]

III. RULES OF MILITARY LAW IN REGARD TO THE FRAMING OF THE CHARGE.

As to the Wording of the Charge—*Approved forms*. Every military Charge must be predicated upon a violation of an existing Article of war or other statute of the United States, and the mode in which the "*charge*," (as distinguished from the "*specification*,") shall be framed depends in the first place upon the nature of the enactment. The forms of such charge are indeed of two classes: those laid under Articles, (or other statutes,) designating *specific* offences; those laid under the two *general* Articles, or Articles providing for the punishment of offences under a general designation, *viz.* the 61st and 62d. The charge, where specific, may consist simply of the name of the offence, as "Desertion," "Mutiny," "Misbehaviour before the enemy;" or, referring to the article under which it is brought, it may be expressed as "Violation of the —— Article of War;"[3] or it may combine the two forms and be phrased as

1. See DIGEST, 153; Simmons § 402; G. O. 78 of 1872; Do. 5[illegible] Dept. of the South, 1871; G. C. M. O. 42, Fourth Mil. Dist., 186[illegible] But see also case of joint absence without leave cited in above note.

2. See Chapter XVI—"Motion to sever."

3. This form has occasionally been criticized as improper or unsatisfactory, (see G. O. 11 of 1862; Do. 32, Army of the Potomac, 186[illegible] Do. 2, Dept. of the East, 1863; Do. 121, Dept. of the Mo., 18[illegible] Do. 21, Dept. of the Columbia, 1885; O'Brien, 233,) but it is sanctioned by the usage of the service, and is not open to *legal* objection. DIGEST 146.

"False Muster, in violation of the 14th Article of War," "Disobedience of Orders in violation of the 21st Article," &c. Where the charge is laid under one of the *general* Articles, it may be worded—"Conduct unbecoming an officer and a gentleman," or "Conduct to the prejudice of good order and military discipline;" or it may be framed in this form with the addition of the words "in violation of the 61st or 62d Article of War;" or—though this mode is here more open to objection than where a *specific* offence is charged—it may be simply expressed as "Violation of the 61st or 62d Article," as the case may be.

Objectionable forms. The above are the only recognized and regular forms of stating the charge; a charge not following one of such forms, if not fatally defective, must be at least more or less faulty. Thus those loose forms of charge, now much less frequent than formerly, such as "Worthlessness," "Incompetency," "Habitual Drunkenness," "Unreliability," "General Bad Conduct," and the like, inasmuch as they do not designate any specific military offence recognized by the code, while at the same time applying to the accused a depreciatory and unfair description in advance of trial, are highly objectionable, and have been repeatedly disapproved in Orders.[1] Where indeed the specifications to such charges merely set forth, (as they generally have done,) former instances of arrests or confinements in the guard-house, or former trials and convictions for slight offences, the pleading is wholly insufficient, "such instances not constituting military offences, but merely the punishments or consequences of such offences."[2] So is the Charge insufficient, where the specification sets forth an habitual course of conduct,

1. G. O. 11 of 1873; Do. 171, D. of the South, 1864; Do. 19, Id., 1867; Do. 9, Dept. of the Gulf, 1866; Do. 16, Dept. of the Tenn., 1867; Do. 85, Dept. of the Cumberland, 1867; Do. 21, Dept. of the Mo., 1863; G. C. M. O. 33, Id., 1874; Do. 35, Dept. of the Platte, 1872.

2. DIGEST, 148. And see G. O. 11 of 1873; Do. 32, Dept. of the Platte, 1870. To try upon such a charge would often indeed involve a violation of the 102d Article, prohibiting a second trial for the same offence. See DIGEST, 149; G. O. 37, Dept. of Florida, 1866; Do. 69, Dept. of the South, 1870. This class of Charges are frequently subject to the objection of being *double*. For example, in G. O. 26, Dept. of the Columbia, 1870, are published two cases, in which a specification to a charge of "Habitual Drunkenness, to the prejudice," &c., alleges that the accused was drunk, in one of the cases on *nine*, and in the other on *eight* specified occasions, "and at various other times."

since the law provides for the trial and punishment not of bad habits but of specific acts of offence.[1] Such Charges indeed, where the specifications allege actual and distinct military disorders or neglects, may be supported, under a principle hereafter to be noticed as Charges under the 62d Article. In such cases, however, they should properly be formally laid under that Article, as "Conduct to the prejudice of good order and military discipline," with a separate specification for each act of misconduct.[2]

A further, less faulty, but also improper and unmilitary form, is the use of intensives in connection with the title of the charge;—as "*Positive*, or *Deliberate*, disobedience of Orders," "*Gross* neglect of duty," "*Corrupt* or *Fraudulent* conduct, to the prejudice," &c. The expletive in such cases cannot heighten or affect the quality of the offence and is wholly superfluous.[3] It is indeed commonly but an expression of the *animus* or estimate of the accuser; but a military charge is no proper medium for the expression of personal feeling or opinion. If the case be an aggravated one, the matter of aggravation, so far as properly descriptive of the alleged offence, may be set forth in the specification,[4] and so far as material to the question of guilt or of punishment, may be brought out in evidence.

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1. G. O. 24, Dept. of Cal., 1865; Do. 43, Dept. of the Ohio, 1863; G. C. M. O. 8, Dept. of Texas, 1873.

A form of pleading may here be noticed as having grown up in our recent practice, which, though not known to the law of indictments, has been adopted in the majority of our military Depts., on account of its *practical convenience*. This is a charge of violation of Art. 62, with a specification which, in setting forth a *specific offence*, (generally one of inferior quality *per se*,) precedes it with an enumeration of previous convictions, (or arrests and confinements,) of the accused, for the same offence, or other inferior offences. No injustice is thus done the accused, while the court is put in possession of the true facts of his military record and enabled more intelligently to adjust the proper sentence—which in practice has generally included a dishonorable discharge. This form of specification has been employed in numerous cases especially in the Departments of the East, the Platte, and California. An instance will be found approved in G. C. M. O. 24, H. Q. A., 1883.

2. DIGEST, 148. And see the G. O. 11 of 1873, in concurrence with previous opinions of the Judge Advocate General, and now incorporated in § 894 of the Army Regulations; also G. O. 21, Dept. of the Mo., 1863; G. C. M. 33, Id., 1874.

3. See the similar case of stigmatizing words added to the charge of "conduct unbecoming an officer and gentleman," in G. C. M. O. 80 of 1875.

4. See note *ante*, as to recent form of Charge under Art. 62.

Irregular but allowable forms under Art. 62. Cases have not been unfrequent in practice where the charge fails either to designate a specific military offence, or to state in an approved form an offence under Art. 62, but where charge and specification taken together do make out a statement of a crime, neglect, or disorder to the prejudice of good order and military discipline. In such cases, to prevent a failure or delay of justice, the pleading as a whole is supported as a legally sufficient statement of an offence under the 62d Article. In the same manner, where a specific offence is charged by name, but the specification does not state facts proper or sufficient to constitute such offence, but charge and specification together amount to an allegation of an offence included within the general description of Art. 62, legal effect may be given to the Charge as a whole by the court, which may proceed to try and *find* accordingly. This principle, which forcibly illustrates the liberality with which rules of pleading are applied in military cases, rests now upon established usage in our service.[1] It will be further illustrated in the Chapter on the Finding.

The Heading No Part of the Charge. The heading or caption by which military charges are commonly prefaced, *viz.*:—'Charges and specifications preferred against A. B.,' adding his rank, office, corps, &c., is no part of the Charge or Charges, and may be omitted altogether. The point is one which would scarcely require to be noticed except for the reason that it has been expressly affirmed by Atty. Gen. Gilpin in a specific case, where an erroneous rank attributed to the accused in the heading was (of course) held not to have affected the validity of the Charge.[2]

In this case, it may be added, the *specification* referred to the accused as "the said" A. B. This was irregular: no reference should be made to the heading, but the designation in the specification should be entire and complete within itself and contain a full description of the accused independently of the heading, even if it but repeats its wording. The heading is even less a part of a Charge than is the "caption" of an indictment.[3]

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1. See DIGEST, 146–7.
2. III Opins. 548.
3. The caption of an indictment is no part of the indictment itself. 2 Gabbett, 278; Wharton, C. P. & P. § 91. It is "merely a preamble to the record." State *v.* Smith, 2 Harr. 532.

The Charge to be Laid under the Proper Article. offence made specifically punishable by a certain Article m of course be formally charged thereunder: to charge it inst as a violation of an Article relating to a different specific offe or of the general—62d—Article, will be a serious defect, for wh the Charge will properly be struck out on motion of the accus The effect of a failure to observe this rule is specially illustra in a case where the Article under which the Charge should h been laid, and that under which it has actually been laid, p scribe different *sentences*, as where the former requires a parti lar punishment to be imposed on conviction, and the latter lea the punishment to the discretion of the court; or *vice ver* But though no such distinction may exist—the two Articles p scribing or permitting the same punishment, or both making t punishment discretionary—the error of the pleading is the sa in law.

Application of the rule illustrated. There can be general but little difficulty in determining under which Articl specific military offence is to be charged, since it will rarely ha pen that such an offence will be found to be included within t descriptions of two different articles. One instance of such inclusion is that of the offence of stealing property of the Unit States, which, in time of *war*, may be charged under Art. 58 well as under Art. 60; otherwise in time of *peace* when it ma properly, be charged only under the latter article. Another i stance is that of the offence of selling or disposing of pub property, which is made punishable, generally, by the 60th, a in certain particular instances, by the 16th and 17th, of the A cles. But the difficulty here is but slight, for where the offe clearly falls within one of these instances, it will properly charged under the particular article: otherwise under Art. Further, where an officer has committed a specific military offe so dishonorable in its circumstances as also to constitute "c duct unbecoming an officer and a gentleman," he is amenable trial for the same act under two articles: but here again ther

1 Digest, 140. And see the charging of specific offences under A 62 condemned in G. O. 5, Northern Dept., 1865: Do. 25, Dept. of Platte, 1871; G. C. M. O. 32, Dept. of the Mo., 1871.

2 See G. O. 18 of 1850; Do. 287 of 1863: Do. 54, Dept. of Tenn., 1866.

io difficulty, since the offence may be charged under both—the ;pecific article and the 61st.

The principal difficulty in observing the present rule will arise n a case where it is *doubtful* whether the offence is one of a class ontemplated by a certain specific article, and therefore properly hargeable under it, or is not within the terms of such article nd chargeable only under Art. 62. Thus there may sometimes e a reasonable question whether the making of a false return hould be charged under Art. 8 or Art. 62; or a disobedience of n order under Art. 21 or Art. 62; or a mutinous act under Art. 2 or Art. 62; or a case of drunkenness under Art. 38 or Art. 2; or a breach of arrest under Art. 65 or Art. 62. But study nd deliberation will commonly solve such questions; and where serious doubt still remains, the difficulty may be in part avoided y charging the act both as a violation of the specific article and ; "conduct to the prejudice of good order and military disci- line." Where indeed the offence is *clearly* one cognizable un- r an Article relating to a distinct offence, to charge it also ıder the general—62d—Article will be superfluous. Where this done, however, the court may properly entertain both charges r the purposes of the trial, unless indeed the specific article akes the offence a *capital* one. In that case, as a capital of- nce cannot be charged under Art. 62, the court will properly ant a motion to strike out the charge laid under this article, as t being within its jurisdiction.[1]

The Specification should be Appropriate to and Sup- ırt the Charge. To complete a valid Charge, not only should e *charge* designate the real offence committed, but the *specifi- ion* should set forth the legal constituents of such offence, as fined by the statute or by the usage and precedents of the serv- . It should, by its statement, cover every item of such defi- ion, so as not only to be appropriate to the distinctive charge t inappropriate to any other—except, perhaps, (in a case of an cer,) a charge under Art. 61.

. Such was the action taken in the case of Lieut. Rogers, where to harge for Disobedience of Orders under the 9th (now 21st) Article, l clearly properly so laid, was added a Charge for the same act laid ler the 99th (now 62d) Article. The latter, being objected to by the used, was stricken out by the court, and the proceedings were ap- ved by the Secretary of War. G. O. 13 of 1848.

Should state facts. Further the specification, to support the charge, should properly set forth *facts*—acts of commission or omission—and not mere inferences or conclusions of law. These, as we have already seen, have no proper place either in an Indictment or a Charge. In a military case, therefore, it is in general defective pleading to allege in the specification merely that the accused did commit the offence indicated in the charge,—as that he did behave himself with disrespect toward his commanding officer, did disobey the order of a superior officer or did offer violence against such officer, did join in a mutiny, did misbehave before the enemy, did commit waste or spoil of private property, &c.;—the *proper* form being to set forth the specific facts and circumstances relied upon as constituting the particular offence charged.[1] In view, however, of the simplicity and directness of the provisions of the military code, a strict observance of this rule is not called for in some instances. Thus it is generally sufficient to allege in a specification to a charge under Art. 47 that the accused *did desert;* and so under Art. 38, that he was *found drunk*, &c.; without specifying in what the desertion or drunkenness consisted or by what acts it was indicated. But, except in such familiar cases, to describe the offence in the specification merely in the words by which it is designated in the charge, or in the Article, is bad pleading; and, where the description is thus bald, the court, upon the motion of the accused, may properly require the specification to be made more definite or be stricken out.

Should describe the complete offence. Lastly, the specification, in its statement of facts, should set forth such facts as will be sufficient, if proved, to sustain, not only the specific charge in contradistinction to any other, but also such charge in its entirety. A specification stating facts which will establish only a portion of the offence charged, or a secondary or incidental offence, will be as insufficient in law as if it stated facts representing an offence of a totally different nature.[2] A familiar instance of a specification not sustaining in its entirety the charge would be one in which, the charge being desertion, the specif-

1. DIGEST, 146–7; G. O. 37, Army of the Potomac, 1861.

2. DIGEST, 147. And compare instance, (in a naval case,) of a specification held not to have supported the charge, in IX Opins. Att. Gen., 223.

ation alleged an absence without leave only; or one where under a charge of "robbery" the specification described a larceny only, the averment as to the use of force, &c., being omitted.

Each of several specifications to be complete and independent. It should be noticed that where there are several specifications, the present rule is to be applied to the framing of each specification precisely as if it were the only specification in the case. While one good specification will sustain the charge, any number of defective specifications will fail to do so. Each specification, therefore, should be entire and sufficient *per se*, independently of every other specification, and without borrowing from, or referring to, any other, each separate specification should contain all the allegations, substantial and formal, which are necessary and proper both to complete itself and to support the charge as laid.[1]

IV. THE PREFERRING OF CHARGES.

Preliminary Investigation — Charges to be well-founded. Only such charges as, upon sufficient investigation, are ascertained to be supported by the facts—are found to be sustained by at least *prima facie* evidence—should be preferred for trial. The preferring of charges, without a proper investigation of the facts in the first instance—a neglect of duty which may entail, besides a needless waste of time spent in the trial, the arrest and confinement of an innocent person—has been repeatedly severely reflected upon in General Orders.[2] In the British military law, such investigation is enjoined by express statute.[3]

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1. See G. O. 12, 33, Dept. of the Mo., 1862; Do. 15, Id., 1863. In the first of these Orders, the fact that the pleader had inserted a general statement of time and place at the end of all the specifications, as applicable to all alike, instead of a separate statement at the end of each, was condemned by the reviewing authority as a marked irregularity.

2. See G. C. M. O. 70, 1875; G. O. 57, Dept. of the Tenn., 1864; Do. 50, 53, Dept. of the East, 1865; Do. 41, Id., 1868; Do. 10, 13, Dept. of the Lakes, 1867; Do. 33, 38, Dept. of the Platte, 1868; Do. 33, Dept. of La., 1868; Do. 24, Fifth Mil. Dist., 1868; Do. 15, 153, 1869; Do. 26, Dept. of the Mo., 1870; Do. 3, Id., 1872; Circ., Id., Nov. 15, 1871; G. O. 7, Dept. of the Gulf, 1872; Do. 11, Dept. of the Columbia, 1872; Do. 29, 71, Dept. of Dakota, 1873.

3. "The charge made against every person taken into military custody shall, without unnecessary delay, be investigated by the proper

Charges not to be Frivolous or Malicious. All charges should be substantial and made in good faith. Where, as the result of imperfect investigation or otherwise, frivolous charges are preferred, or where the charges are actuated by a hostile *animus* and are not in themselves well-founded, they are not a proper basis for a trial by court-martial. When such charges have been tried, they have not unfrequently exposed those preferring them to grave censure and in some cases to severe punishment.[1]

To be Preferred against the Responsible Party. The charge in every case should be preferred only against the person responsible for the act. Where there is any doubt as to which of several persons is the one properly chargeable with the offence committed, they should not all be charged, if by a more complete investigation the guilty party can be distinguished.[2] Further, where superiors and inferiors have offended together, or superiors

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military authority, and, as soon as may be, either proceedings shall be taken for punishing the offence, or such persons shall be discharged from custody." Army Act § 45, (5.)

1. See a recent case in G. C. M. O. 71 of 1879. In sundry cases reported by James, (see pp. 81–4, 241, 266, 340, 372, 538–9, 583, 604–5, 792,) the preferring of frivolous or baseless charges is severely animadverted upon by the reviewing authority, and in several instances the officers who preferred the same are summarily dismissed the service. In G. O. 86, Dept. of the Mo., 1867, Gen. Hancock observes:—"To prefer accusations which cannot be maintained is highly injurious to the service and reflects discredit upon those who prefer them; and if upon trial the charges are found to be groundless, the officer preferring them should be held accountable and be tried himself for preferring malicious charges." Frivolous charges relating to *personal* matters are condemned by Gen. Crook, in G. O. 2, Dept. the Columbia, 1870, as follows:—"It is to be regretted that the Department Commander should be called upon to convene a court-martial to settle differences of opinion and peccadilloes between officers, which, it seems to him, should be settled among themselves, and not only without trouble, but without their being published to the world." And see remarks of the same Commander, in G. C. M. O. 3, Dept. of Arizona, 1884, as to the impropriety of making personal difficulties between officers the subject of charges.

So charges should not in general be preferred after the offence has been once passed over, and the accused has been released from arrest and restored to duty, and his misconduct has not been renewed. Surgeon Joliffe's Case, James, 516, Bombay R., 3.

2. In certain cases, published in G. C. M. O. 120, Dept. of the East, 1870, where three soldiers were separately charged, tried, and sentenced, for the same act as committed by each, the proceedings were all disapproved because it did not appear from the evidence which, or who, was the actual offender and responsible party.

ıave sanctioned offences of subordinates,—whatever proceedings t may be thought proper to take against the latter, charges should ertainly be preferred against the former, as primarily responsible ınd deserving punishment.[1] So, where duties have been improperly performed by soldiers, by reason of their having been ıssigned to the same when drunk or otherwise unfitted to perform them, by superiors cognizant of their condition, it is the latter who, as primarily responsible for the consequences, should become subject to charges rather than the former.[2]

All Existing Grounds of Accusation to be Presented Together — Accumulation of Charges. While charges should be prepared and preferred with as little delay, after they have been investigated and determined to be well-founded, as may be reasonably practicable, care should be taken that *all* the charges and specifications to which the party may be subject be preferred together. Unlike the ordinary criminal procedure, where but one indictment, setting forth (in one or more counts) a single offence or connected criminal transaction,[3] is in general brought to trial at one time, the military usage and procedure permit of an indefinite number of offences being charged and adjudicated together in one and the same proceeding.[4] And, with a view to the summary and final action so important in military cases,—wherever an officer or soldier has been apparently guilty of several or many offences, whether of a similar character or distinct in their nature, charges and specifications covering them all, should, if practicable, be preferred together and together brought to trial; separate *sets* of charges, where they exist, being consolidated.[5] Where all the charges to which a party is amenable are known or can readily be ascertained, and the testimony to establish them is available, to bring one or a portion to trial separately, and the other or remainder to a further trial later, is an irregular proceeding.[6]

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1. See DIGEST, 247 § 3.

2. See G. O. 2, Dept. of the Platte, 1873; G. C. M. O. 46, Dept. of Texas, 1880.

3. See Sec. 1024, Rev. Sts.

4. Specifications setting forth distinct acts of offence were especially numerous in cases during the late war; amounting in one instance, published in G. O. 43, War Dept., 1863, to *sixty-one* in number.

5. See DIGEST, 148.

6. Such a proceeding is condemned in G. C. M. O. 37, Dept. of the Platte, 1872.

What is known as the "*accumulation*" of Charges,—which is the allowing of slight offences to pass apparently unnoticed, until a sufficient number have been committed to make up together, when stated in separate specifications, a show of grave misconduct in the aggregate,—has been universally condemned, and the preferring of charges thus reserved has been commonly attributed to a hostile *animus*, to the serious disadvantage of the prosecution upon the trial.[1] Where indeed the dereliction of the party consists in the *habitual* nature of his misconduct—as that he is habitually addicted to becoming drunk—it may be proper to delay preferring the charge till instances sufficient to indicate the fact of habit have transpired; but such delay should not be unreasonably prolonged.[2]

By whom Charges are to be Preferred.[3] Preferring charges, in a general sense, consists in being the author of, or person responsible for, specific accusations presented against an officer or soldier. The "accuser," referred to in Art. 72, is, in this sense, the preferrer of the charges; and so is the "prosecutor" where he has either originated or adopted the accusation. In *law*, however, and as the term is employed in the present connection, the preferring of charges consists in the formal subscription and authentication of such charges for official purposes. A military charge, by whomever *initiated*, must—to serve as a

1. "Delaying to bring forward charges" and "permitting them to lie dormant justifies the impression that the prosecutor is not actuated by public motives alone in their institution." Simmons § 382. "It is highly improper to hold charges in reserve against an officer or soldier in order that they may accumulate so as to form collectively a crime of sufficient magnitude to justify a prosecution." Macomb, 26. And see Tytler, 162, 163; De Hart, 99; Harwood, 46; Ives, 88; I Opins. Att. Gen., 295; G. C. M. O. 71 of 1879; G. O. 12, Dept. of the Mo., 1863; Do. 53, Dept. of Va. & No. Ca., 1863; Do. 41, Dept. of Washington, 1868; Do. 10, Dept. of the Platte, 1871; Do. 30, Dept. of the South, 1873; G. C. M. O. 2, Dept. of Texas, 1882; Do. 45, Div. Pacific & Dept. Cal., 1882; DIGEST, 147. In two cases reported by James, (pp. 203, 461.) the accuser, an inferior in rank, who had accumulated charges against his superior, the accused, was dismissed the service, in the Order publishing the proceedings. The rule of course does not apply where the offences, though long since committed, have recently all come at the same time to the knowledge of the officer preferring the charges. G. O. 33, Dept. of Arizona, 1871.

2. See DIGEST, 147. In such case each *instance* should of course form the subject of a separate specification.

3. Compare, under this head, DIGEST, 154.

roper basis for official action and trial—be *formally* preferred y a commissioned officer of the army. Such a charge may *originate* either with the formal preferrer himself, or with any other ndividual whether or not in the military or public service. A ivilian, if first advised or personally cognizant of a serious offence ommitted by an officer or soldier, may, as properly as any miliary person, bring the same to the knowledge of the military uthorities, and indeed is but performing a public duty in so loing.[1] So, a charge may be advanced in the first instance by n enlisted man. But although a civilian or a soldier may preent the charge in writing and duly framed, the *formal* preferment of the same—the legal act—must be by and under the signature of an *officer*.[2]

Any officer, of whatever rank, and whether or not exercising command, may legally prefer a charge, and at any time. There s no military status which involves a legal disqualification to refer a charge: an officer, though himself under charges, in rrest, or under sentence, may not only originate but formally refer charges with the same *legal* effect as any other officer. But while any officer may legally thus act, the preferring of harges by certain officers is not favored. Thus charges by a unior against a senior in rank, unless ordered to be preferred, or anctioned, by a common superior, are not encouraged in practice.[3] In general charges will most appropriately be preferred ither by the commanding officer of the accused, by a superior in ank, or by the judge advocate of the court,—the latter acting fficially and by the direction express or implied of the con-

1. That the validity of a charge is not affected by the fact that it *originated* with a civilian, see G. O. 33, Dept. of Arizona, 1871 ; also Gen. Swaim's Case, G. C. M. O. 19 of 1885.

2. The peculiar practice of the preferring of charges against naval officers by the Secretary of the Navy has no counterpart in the military ervice. As to the objections to this practice, and its sanction by usage, ee Trials of Com. Wilkes, pp. 2–3, and of Com. T. A. C. Jones, p. 367.

3. Such charges have been especially discouraged in the British service, where, in repeated cases, juniors who have preferred *and prosecuted* harges against their seniors have been severely rebuked, and not rarely, f commissioned officers, dismissed, or, if non-commissioned officers, educed to the ranks. See James, pp. 35, 167, 203–4, 210, 266, 331, 372, 463, 539–40, 543, 583, 600–1, 648, 727, 759. In the review of one f these cases—Col. Quentin's—it is remarked by the Commander-in-hief: "A regard due to the subordination of the service must ever ttach a severe responsibility to subordinate officers who become the ccusers of their superiors."

vening authority. In any case an officer may be ordered by hi proper commander, (or by the President, through the Secreta of War or a military representative,) to prefer charges again another officer or an enlisted man.[1]

Form of Preferment. A charge is officially authenticat and preferred by the formal subscription of the same by the p ferring officer with his name, rank, regiment, corps, or offic It is not *essential*, to give a court-martial *jurisdiction* of t offence or the offender, that the charges should be thus authen cated, or signed at all. Such court, however, would prope defer proceeding to trial, as would also the accused prope object to be arraigned and to plead, where the charges had be omitted to be subscribed in the usual manner.

To Whom to be Preferred. Charges are to be prefer to the commander authorized to order, or who would, under t circumstances, most appropriately order, the court. Such co mander, (where trial by a general court-martial is proposed,) w be the Division, Department, or Army commander, (or in ti of war a commander empowered by Art. 73,) the Superintende of the Military Academy, or the President. By *preferring to* meant officially addressing and forwarding to the command through the proper military channels, (or directly where permis ble,) the formal charges; the same being usually accompani with a request or recommendation, expressed in the letter transmittal, that such charges, if approved, be referred to court-martial for trial. In the rare cases in which a command authorized to order a general court-martial himself prefers direct the charges, he will properly prefer them to the court throu the judge advocate; unless he be the "accuser or prosecutor" the accused in the sense of Arts. 72 and 73, when he will pre them to the President or the "next higher commander," as t case may be.

V. THE REFERRING OF CHARGES FOR TRIAL.

By Whom and How Referred. Regularly and prope charges can be referred to a general court-martial for trial o

1. This point was in substance held by Maj. Gen. Brown, as G Comdg. the Army, in G. O. 3 of 1826.

2. Signing charges as "by order" of a superior is not approved customary in our practice, though the signing may have been ordere fact. Otherwise in the British service. Simmons § 494.

y the commander by whom the court has been convened, (or his uccessor in command,) or by his authority. The referring of harges to the court by the "highest authority on the spot"—as he post commander—has been sanctioned in some Orders, with pecial view to the trial of enlisted men.[1] But unless expressly uthorized by the department, &c., commander,—as it sometimes as been where the court was assembled at a post or station re-ıote from his headquarters,—such a reference by an inferior ommander is irregular and improper.[2]

The reference, by the department, &c., commander, of the harges to the court is not made till the same have been *approved* y him, and such approval is not given till the charges have een examined by the commander, or by the judge advocate or ther proper staff officer attached to the command, and if neces-ıry revised and corrected.

Upon the approval, the charges are, regularly, transmitted om the headquarters to the judge advocate or president of the ourt—usually and preferably to the former—for prosecution and ial.

VI. AMENDMENT OF CHARGES AFTER REFERENCE FOR TRIAL.

Charges duly referred for trial are, in law, ordered to be tried ; they stand. Thereafter to assume to amend them without roper authority is a military offence. As will appear in Chap-r XVI, the court may strike out a charge or specification on otion of the accused if sufficient cause be exhibited; but, lf-moved and of its own original capacity, it has no power hatever to amend, modify, discard or withdraw any part of the

1. In an Order of Gen. Scott, (G. O. 57, Hdqrs. of Army, May 20, 57,) referred to and followed in a few subsequent Dept. G. O., the ference by the post commander is held authorized except where he is mself a member of the court. This however is not a correct statement the law as now held and observed.

2. DIGEST, 154; G. O. 67, Dept. of Ark., 1864; Do. 47, Dept. of East, 1868; Do. 88, Dept. of Dakota, 1869; Do. 2, Dept. of the ıtte, 1873; Do. 8, Dept. of Texas, 1874. The irregularity would be *gravated* where the post commander was himself a member of the ırt. See G. O. 68, Dept. of Dakota, 1875, where he was the presi-ıt of the court, and it was held that his action had rendered him liable challenge.

charges or specifications officially committed to it for trial.[1] How far the judge advocate may be empowered to amend, &c., will be considered in Chapter XIII. It need only be said here that he can have no authority for this purpose *virtute officii*, but must be thereto authorized—if authorized at all—by the superior by whom he has been detailed.

It may be added that where a command is furnished with a competent officer of the Judge Advocate General's Department, or staff officer acting as such, all charges will have been fully revised before being referred for trial. There will thus rarely be occasion for any considerable amendments at a later stage.

VII. ADDITIONAL CHARGES.

This is a technical term in military law, meaning new Charges which are advanced *after* the preferment and service of the particular Charge or set of Charges for the trial of which the court has been ordered, or upon which the accused was originally intended to be arraigned.[2] Such Charges may relate to past transactions which were not known by or brought to the attention of the officer framing or ordering the original Charges, at the time these were preferred; or they may, as is more frequent, arise from acts of the accused subsequent to his arrest on the original Charges. Thus if, after such arrest, he commits a "breach of arrest," an "additional" charge will properly be added in the case, and served upon him. Charges of this class do not require a separate trial, but may and properly should be tried by the same court which tries the original Charges, and at the same time. They must, however, be brought before the court prior to its being sworn. After the court has been duly sworn to try and determine "the matter now before it," further or "additional" Charges (or specifications) cannot legally be entertained by it at that trial, but must await a separate investigation.[3]

1. Or, where it has been ordered to try a duly amended form of charge, to substitute for it the original form, as, in its opinion, preferable. G. C. M. O. 210, Dept. of the East, 1884.

2. In a few early cases, "supplementary" charges, so called, were added *after* "additional" charges. See instance in G. O. 72 of 18

3. See the law on this point as stated in DIGEST, 68, 148; also Simons § 415; Kennedy, 81–2; De Hart, 102; G. C. M. O. 39 of 18, G. O. 13, Northern Dept., 1864.

VIII. THE SERVICE OF CHARGES.

Form and Manner of Service. The service of Charges consists in delivering personally to the accused a true copy of the charges and specifications upon which it is proposed to bring him to trial. There is properly in military law no other service of charges than a personal service, since the United States is supposed to have the accused always in custody or within its control.[1] The service is usually made by the judge advocate of the court, the adjutant of the command,[2] or other officer or non-commissioned officer detailed for the purpose.[3] In a case of an accused soldier who is illiterate or imperfectly acquainted with the English language, the charges and specifications should be read and their contents explained to him by the officer making the service.[4]

In making service it is desirable, in a case of importance, that the officer, &c., should note on the original draft the fact, date and place of the delivery of the copy. It is also proper that he should compare with the accused the original and copy furnished, so that both parties may be assured that a true copy has been served.

List of witnesses. Though the accused has no right to demand it,[5] it is yet proper and desirable that there should be appended to the Charges as served upon him a list of the witnesses by whom it is proposed to support them. The accused will thus be the better advised of the source and basis of the complaint, and so better enabled to prepare his defence and to determine what witnesses he will require to rebut or impeach those of the government. The list, however, is no part of the charge and is frequently omitted. Though added and served therewith, it will not oblige the prosecution to introduce the wit-

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1. It may be noted that the entering of a written charge against the prisoner by the officer making the arrest, in the manner indicated in Art. 7, cannot in general answer as a personal service of the formal charges and specifications.

2. Simmons § 416.

3. The service may be made by a private soldier or even by a civilian, but this is not usual.

4. Simmons § 416. And see Rules of Procedure § 14 (B.)

5. Hough, 705; Simmons § 423; G. O. 52, Dept. of the Platte, 1865.

CHAPTER XI.

'HE FORMAL ORDERING, MEETING, &c., OF THE COURT.

The subject of this Chapter will be considered under the llowing heads:—I. The Convening Order, and Orders Supplemtal thereto; II. The Meeting and Opening of the Court; I. Preliminary Business; IV. Introduction of Accused; V. lmission and Status of Counsel; VI. The Clerk and other sistants or Attendants.

I. THE CONVENING ORDER, &c.

Its Effect in General. As already shown, a general courtırtial is constituted by a military order, issued either by the mmander-in-chief or one of the military commanders speically authorized for the purpose by statute. An outline of : Order, as generally framed, is given in par. 881, Army Reguions. In its usual form this Order is a direction to certain icers named to assemble at a certain time and place and form :ourt for the trial of a person or persons specifically or in ıeral terms indicated, and to a further officer to act as judge ɔocate of such court. A copy of the Order, written or printed, ɔroperly, and in practice, delivered or transmitted to each of : officers designated. Its particulars illustrate in brief the law etofore stated at length in regard to the constitution and nposition of general courts.

Particulars—1. The Caption. This, where the court is ıvened by a military officer, should indicate the headquarters he command of the officer who makes the order. As—"Headırters of the Army;" "Headquarters, Army of the Potomac;" Headquarters, Department of California;" "Headquarters, st Division, First Army Corps," &c.,—with the *place* at which headquarters are situated, and the *date*. If issued by the

Commander-in-chief, the Order may be headed—"War Department," or "Headquarters of the Army, Washington, D. C.," according as it is issued through the one or the other. If the order proceeds from the Superintendent of the Military Academy, the heading will be "U. S. Military Academy, West Point, N.Y." The caption should not only identify the command, but indicate that it is one of which the commander is authorized to convene a general court-martial: otherwise it is invalid upon its face.[1] That the Order is dated on a Sunday affects in no manner its validity.[2]

2. Place and Time of Meeting. The Order then proceeds to announce and direct that a General Court-Martial will assemble, or convene, or is appointed to meet, at a certain place, naming a particular post, station, &c.,[3] on a certain specified day, 'or,' as it is usually added, 'as soon thereafter as practicable.' The time or place, or both, may be changed by a subsequent Order from the same source.[4] It would not be proper for the court, of its own authority, to depart from either; though if it did so the validity of the proceedings would not necessarily be affected: a general approval of the same by the commander would sanction the irregular action.[5]

3. The Name of the Party or Parties to be Tried. The Order then subjoins: 'for the trial of'—naming a certain officer or enlisted man—'and such other persons (or prisoners) as may be brought before it;' or, more generally, since it is not necessary to designate any particular person or persons,[6]—'for the trial of such persons as may be brought before it.' Where a particular person *is* named, it is usually an officer, &c., who

1. See DIGEST, 57–8, 353.

2. DIGEST, 353.

3. In G. Field O. 4, Dept. of Dakota, 1867, the court is ordered to meet on a transport steamer. In G. O. 76 of 1869, it was directed that "Military courts will be assembled at posts or stations where the aggregate expenses of trial or examination will be least."

4. See De Hart, 88.

5. In G. O. 172 and 185, Dept. of the Ohio, 1863, the proceedings were disapproved because the court, in one instance, met and acted *place*, and, in another, on a *date*, other than as indicated and dire in the convening Order.

6. See G. O. 52, Div. Pacific, 1865.

trial was the original or special occasion for convening the court. The party named, if any, should of course appear to be a person within the military jurisdiction. If the Order specifies that the court is convened for the trial of a certain class of military persons only, its effect is to preclude the trial of persons not within that class. Thus a court would not be authorized to try an enlisted man under an Order directing it to assemble for the trial of "officers."[1]

4. The Detail of the Members. The Order then proceeds to name the officers who are to compose the court, observing the principles of law heretofore laid down in regard to the class, rank, number, &c. The number must of course be at least five and not more than thirteen. The detail are arranged in order of rank, but the senior and first in the list need not be, and is not in our practice, designated as "President." The precedence given to certain officers as senior to others in the Order is conclusive on the court till changed, as it may be, by a supplemental Order; but an error in the statement of the rank, or relative position of any member, or of his regiment, corps or office, will not affect the validity of the Order.

The detail in the original (or a supplemental) Order is the authority for the members named to appear, be sworn and act on the court,[2] and consequently to absent themselves (if necessary) from their posts or stations, and to receive transportation or mileage if the same be otherwise allowable and duly certified.[3]

5. The Designation of the Judge Advocate. This usually follows the detail of the members, but the Order is not defective if it fail to name an officer as judge advocate: one may be appointed by a supplemental Order. Sometimes indeed the original Order expressly states that a judge advocate will be designated in a subsequent Order.

6. Clause Accounting for the Number, &c., of Members. Where the detail is less than thirteen it is customary to

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1. DIGEST, 353–4; G. O. 106, Army of the Potomac, 1862.

2. An officer may be detailed upon a court-martial by telegraph. A telegram, however, to an officer to the effect that he will be, or is to be, detailed by a formal order, will not *per se* authorize his acting as a member. See G. C. M. O. 42, Dept. of the Mo., 1874.

3. As to the certificate, see *post*.

add in the Order, following the language of the 75th Arti clause to the effect that—"No greater number can be de without manifest injury to the service." The early rulir the U. S. Supreme Court and the Supreme Court of New in which this Article was construed, have been heretofore re to,[1] and it has been seen that such clause is quite unnece the determination of the Commander that thirteen cam detailed without manifest injury, &c., being sufficiently sig by the mere fact of his detailing a less number.[2]

The wording of the clause sometimes is—'No *other* men or officers,' &c.; this form being employed for the double pose of declaring, not only that no other, *i. e.* greater, *nu* can be detailed without manifest injury, &c., but also th officers of other, *i. e.* higher, *rank* can be selected; the obj the clause in its latter purport being to account for the pl upon the detail of an officer or officers *junior* to the acc which Art. 79 prescribes shall not be done "where it c avoided." But it is as unnecessary to account in terms i Order for making the case an exception to the rule of Art. it is to explain in terms the not detailing of the maximum ber. This form of the clause in question is therefore as s fluous as that first mentioned.[3]

The direction formerly added here, to the effect that, sl some of the members fail to arrive, the court might proce business provided the number present was not less than fi now quite disused; the rule of law empowering five to cons a court under all circumstances being now perfectly well u stood.

7. Direction as to Hours of Session. Where, ir opinion of the convening authority, the exigencies of the ice, or other circumstances, require that an exception be to the general rule prescribed in Art. 94,[4] it is added in the that—"The court will sit without regard to hours." direction is not unfrequently given in a supplemental Orde

1. See Chapter VII.
2. See DIGEST, 59, 60.
3. DIGEST, 61.
4. See this Article as separately considered in Chapter XXV.

8. The Certificate as to Travel. The Act of June 30, 1882, c. 254, in appropriating, among other things, for the mileage of officers travelling "on duty under orders," added—"the necessity for such travel to be certified by the officer issuing such order." In cases, therefore, where the convening Order details officers stationed at posts, &c., other than the post or station at which the court is to be held, the following certificate is now required to be subjoined:—"The travel involved in the execution of this Order is necessary for the public service."[1]

9. Subscription of the Order. The original order, (which may be written or printed,) should appear subscribed, in writing or in print, by the President or Secretary of War,[2] or by the military Commander, with his rank and a reference to his command as indicated in the caption. The subscription should be consistent with the caption. Copies of the Order are commonly further authenticated by the signature of the Adjutant General, Assistant Adjutant General or other staff officer.

Supplemental Orders. Prior to the organization of the court the Convening Order may be amended, modified, or supplemented by any number of subsequent Orders from the same source,—by which a member or the judge advocate may be relieved, new members added or substituted, the place or time of meeting changed, the hours of session extended, &c. In the record of trial these Orders will properly follow the original Order, so that they may readily be compared therewith, and the authority of the court and of each member, and of the judge advocate, to act as they are shown to act in the proceedings, may clearly appear. Supplemental Orders may also be issued at any stage pending the trial: they are comparatively rare, however, after the arraignment.

II. THE MEETING AND OPENING OF THE COURT.

Arrival, Coming to Order, and Seating of Members. Pursuant to the Convening Order, (and the supplemental Orders, if any,) the officers named in the detail for the court assemble in

1. See G. O. 86, 131, of 1882.

2. The subscription by the Secretary is presumably of course by the uthority of the President and his act in law. See G. O. 35 of 1850; lso Chapter III—ORDERS.

full uniform[1] at the time and place named, in such building or room as may have been set apart for the purpose by the post, &c., commander, or provided by the quartermaster's department. When five or more have arrived, they may proceed to business: till five appear those present usually adjourn from day to day to await the attendance of at least the minimum number.[2]

A quorum of members being assembled, they are called to order by the senior as presiding officer, and, as the roll is called by the judge advocate, take their seats according to their relative rank alternately at the right and left of the president, in the manner of all judicial bodies. The judge advocate is commonly seated at the table opposite the president, and seats are provided at his right and left for the accused and his counsel, and for the witnesses; the former being also generally furnished with a separate table.

Opening to the Public. It is, in the majority of cases, at this stage that the court is pronounced by the president to be open, or is considered to be open, to the public, the accused being at the same time introduced. Where indeed there is preliminary business to be deliberated upon, of the kind—presently to be considered—which does not require the presence of the accused, the public is also properly excluded till this is transacted: in the discretion of the court indeed the opening may be deferred till the time has arrived for the arraignment. In general, however, the opening of the court either concurs with its original assembling or follows closely upon it. It may properly, therefore, be noticed at this point.

Once opened, the court-room, though at any stage of the trial it may be permanently closed at the discretion of the court, is, in general, continued open throughout the investigation, (except when the doors are closed for deliberation on interlocutory matters,) and also during the closing arguments of the counsel, or till the final clearing for judgment.[3] While thus open the public is allowed to come and go much as in the civil courts. Noisy

1. As to the wearing of uniform, see remarks in G. O. 29, Dept. of the South, 1872; Do. 43, Dept. of Dakota, 1874.

2. That a less number than a quorum is authorized to adjourn, see Digest, 50.

3. "At other times," *i. e.* other than occasions of clearing for deliberation,) "except to those persons who have been summoned as witnesses, a court martial is open to the public, military or otherwise, subject to the capacity of the room or tent in which it is held, and the

nd improper persons may of course be required to withdraw and if necessary be forcibly excluded. So, if it is determined by the court, as it may be, that its proceedings shall not be reported except officially, newspaper and other reporters may be required not to take notes under penalty of exclusion if they attempt it.[1] In general, however, such reporters are freely admitted, and sometimes even special accommodation is provided for them. Where there is difficulty in clearing the court, excluding particular persons, or keeping order, the proper commander at the post, station, &c., may be called upon by the court to furnish, and will properly furnish, a sufficient force for the purpose. In the cases also of this nature which are within the provision of Art. 86, yet to be considered, the court may itself punish as for a contempt.

III. PRELIMINARY BUSINESS.

Five members having assembled, a *court* is constituted—not a court empowered to proceed to trial, because the members have

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convenience of the court and parties before it." Simmons § 454. And see Clode, 135–6; De Hart, 94; DIGEST, 205. That courts-martial were originally, (under the Carlovingian kings,) held in the *open air*, see Von Molitor; and compare Code of Gustavus Adolphus, Art. 159, where criminal cases before such courts were required to be tried "*under the blue skies.*"

1 See Clode, 139; Hough, (P.) 778; De Hart, 109. In some cases the court has made a special order on the subject early in the proceedings. See Gen. Whitelocke's Trial, p. 7; Lt. Col. Johnston's do., p. 7; Col. Quentin's do., p. 349; Capt. D. Porter's do., p. 377; Capt. Hurtt's do., p. 5. In the first-named case the reason was assigned that otherwise subsequent witnesses would be advised as to what previous witnesses had testified. On Gen. F. J. Porter's Trial, p. 31, the judge advocate having called the attention of the court to the fact that the testimony as published in the newspapers contained gross errors, the court cautioned the reporters present against a continuance of the same. In U. S. *v.* Holmes, 1 Wallace, Jr., 10–11, it was announced on the trial by Mr. Justice Baldwin:—"We have the power to regulate the admission of persons and the character of proceedings within our own bar. * * * No person will be allowed to come within the bar of the court for the purpose of reporting, except on condition of suspending all publications till after the trial is concluded." But at *military* law, a publication, after an order by a court-martial prohibiting it, would not be punishable as a contempt. See Chapter XVII.

The right to prohibit publications does not authorize the seizure by the court of notes taken in violation of its order. In the case of Ricketts *v.* Walker, Calcutta, 1841, (Hough, P., 718; Manual, 162, note,) a reporter recovered nominal damages against the president of a court-martial for causing the forcible seizure of his notes which he had continued to take after being ordered to desist.

not as yet qualified for this purpose by taking the oath prescribed by Art. 84, but a court competent to proceed with the *preliminary* business. This business is of two kinds,—(1.) that which may be transacted before the accused appears or in his absence,—(2.) that which can be transacted only in the presence of the accused.

Before the Introduction, or in the Absence, of the Accused—*Settlement of questions of precedence.* In the great majority of cases, no business whatever is found to be required to be transacted by general courts-martial at this stage, the occasions for such business being removed by the previous proper revision of the charges, framing of the convening order, &c., at headquarters. From time to time, however, an error in such order, caused by a misconception of the relative rank of members, will give rise to a question of precedence on the court. The order itself can of course be amended only by the convening authority; but a slight error of the kind indicated, such for example as may occur from mistaking the date of a commission, may often be amicably corrected by the members themselves in their taking their proper places without waiting for the formal modification of the order. Where the error is less simple, as where its correction will require a construction of the law by the convening officer, the proper course will be to refer to him the question involved for his determination. Now that brevet rank is no longer operative on courts-martial, questions of precedence are less common than formerly. The most recent question of any importance of this class was whether an officer, while acting as aid-de-camp of the General or Lieut. General, should sit on a court according to his increased rank as such or the inferior rank of his actual military office; and it was held by the Judge Advocate General,[1] and the Attorney General[2] concurring with him, that the former, as being the legal rank of the officer at the time, should determine his relative position on the court.

Questions as to the sufficiency of the charges. On looking over the charges in the case to be tried, copies of which

1. DIGEST, 103-4.

2. XVI Opins. 551. As to the right of precedence, on courts-martial, of assistant surgeons with the rank of captain, see DIGEST, 123.

ill properly have been laid before the members by the Judge dvocate, the same may be found by the court to be so clearly fective upon their face as properly to call for revision before ial.[1] As already pointed out, the court has at this stage no thority of itself to make or direct to be made any material odification of the charges. If, therefore, the necessity for such odification is obvious, the court will at once communicate on e subject with the convening commander with a view to having e proper correction or re-framing ordered. Or if the judge vocate has already been authorized by such commander to ake, with the concurrence of the court, such amendments of e pleadings as may be found desirable, the required changes ay be made forthwith.

Other questions. The court at this stage may also entertain y serious consideration—suggested by the form or contents of e convening order, or by the charges, or the two together—ecting its own legality or powers as a military body. But unss the defect be a *palpably fatal* one, which, if not corrected, ll clearly invalidate the proceedings, the court will not in genal, of its own motion, raise an objection calling in question the iginal authority of the commander, or its own right to exist or to , but will leave the same to be regularly raised by the *accused*, presently to be indicated.

After the Introduction of the Accused, and before the urt is Sworn. The principal preliminary business of the urt at this stage will consist of—1. Entertaining objections by accused to further proceedings: 2. Entertaining objections way of challenge to individual members.

1. At this point the accused, being present, may properly raise, d the court may properly hear and determine,) any objection ing to the legal existence of the court or its authority to prod further in the case. Thus he may object that the court has been legally constituted or composed, or that it is without isdiction either of the person or of the offence or offences rged. While a jurisdictional objection, by way of plea to the isdiction, or motion to strike out a charge as not setting forth offence cognizable by the court, is more commonly made after arraignment, the present is the more appropriate occasion for

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See Simmons § 457; De Hart, 111.

raising, arguing and passing upon exceptions to the court as constituted or composed, such exceptions being of a radical character. What objections of this class would be valid and final have already been indicated in the Chapters on the Constitution and Composition of General Courts. The Chapter on Jurisdiction has also exhibited the grounds on which could be based exceptions to the authority of the court to try the accused or the charge. These classes of preliminary objections need not therefore be further considered. It will be sufficient to remark that in case any of the objections referred to be interposed by the accused and sustained by the court, the president[1] will properly communicate the facts to the convening authority for such action as he may deem expedient.

2. Whether or not any exceptions to the court as a whole be taken at this stage,—and such exceptions are comparatively rare,—this time is the proper one for offering objections to the members by way of *challenge* under the 88th Article of war. The subject, however, of such objections, being an extended one, will best be considered in a separate Chapter.

IV. INTRODUCTION OF ACCUSED.

Cases of Officer and Soldier Distinguished, &c. The court having no control over the person of the accused outside the court-room,[2] the accused—if an officer—will be conducted by the presence of the court by the adjutant, officer of the day, or other officer detailed for the purpose; or he will be ordered by the proper superior to appear before the court, or to report to the judge advocate for trial; or, (as where not in arrest,) he will appear voluntarily when notified of the time and place.[3] The first form is not commonly resorted to except in a case of close arrest. An enlisted man is usually sent, by the officer of the guard or adjutant, to the court-room under guard, his guard being directed to report to the judge advocate. In the case of a non commissioned officer a guard may be dispensed with. Upon an adjournment, the accused is remanded, or reverts, to the custody, control, or status which he was under when first into

1 See DIGEST, 205 § 17.

2 Simmons § 356, 473; De Hart, 113; DIGEST, 201.

3 At the opening of Gen. Hull's trial it is stated, (p. 3,) that accused appeared "accompanied by an aid-de-camp."

ced.[1] Whether officer or enlisted man, the accused should pear before the court in uniform; officers and non-commis-ned officers without their side-arms or sashes.[2]

Prisoner not to be Introduced in Irons. The accused ›uld not be introduced with hands or feet fettered, and if he ; been previously confined in irons these should be taken off :ore he is brought into the court-room,—unless there be reason-.e apprehension of an attempt to escape or of violence on his :t, or of a rescue. It is a principle as old as the common law ıt, except where such apprehension is entertained, the pris-:r, at his arraignment, should be free in all his limbs before : court, so that he may be in no manner hampered in making defence.[3] In the practice of courts-martial, inasmuch as the :used is introduced into the court before arraignment in order be afforded an opportunity to exercise the right of challenge, s privilege of freedom from physical restraint is allowed him l enforced by the court from and after his first appearance, ·oughout the trial.

Disposition of Accused when not Presentable, or Ill, . If the accused makes his appearance improperly dressed, or a dirty or unkempt condition, the court may require him to removed and returned with the neglect remedied. If he is oxicated, he should not be allowed to be arraigned till he is ›er. If he be ill, and unable to leave his quarters or the hos-al—a fact which should properly be shown by a medical cer-cate—the court will ordinarily adjourn to a day on which he ı probably appear in a condition to plead and defend.

. Simmons § 473.

:. See G. O. 29, Dept. of the South, 1872.

. "Every person, at the time of his arraignment, ought to be used h all the humanity and gentleness which is consistent with the nature he thing, and under no other terror or uneasiness than what proceeds n a sense of his guilt and the misfortune of his present circumstances; ı therefore ought not to be brought to the bar in a contumelious ınner, as with his hands tied together or any other mark of ignominy reproach, nor even with fetters on his feet, unless there be some ger of a rescous or escape." 2 Hawkins, c. 28, s. 1. And see 2 e, 219; Layer's Case, 16 How., St. Tr., 101, 129; Rex *v.* Waite, each, 28; 1 Bishop, C. P. § 731, 955; Tytler, 220; Kennedy, 41; mons § 473; De Hart, 113; DIGEST, 218–219; People *v.* Harring-42 Cal., 165; G. O. 52, Dept. of the East, 1869; Do. 47, Dept. of :ota, 1871.

V. ADMISSION AND STATUS OF COUNSEL.

Proper Time for Admission. It is upon the origin introduction or appearance of the accused that his counsel wil properly be admitted, if he make application to the court for th purpose.[1] Hughes[2] fixes the proper time for such application a after the plea; De Hart as after the court has been sworn, thoug he adds that the privilege "may be allowed at any time."[3] I is obvious that, prior to the organization of the court, counse may be of material assistance to the accused, especially in th presenting of objections to the authority of the court to proce with the trial, and in the offering and maintaining of challenge it is at this early stage, therefore, that counsel will most adva tageously be admitted.

The Admission a Privilege, not a Right. The admi sion of counsel for the accused in military cases, though not right but a privilege only,[4] is a privilege almost invariably a ceded and as a matter of course,[5] and this whether the couns proposed to be introduced be a military or civil, professional o unprofessional, person.

But being a privilege, it is subject to be restricted by the court Thus while an adjournment will in general be had, or a contin ance be granted, to afford the accused an opportunity to procu suitable counsel, the court will not delay beyond a reasonab time for such a purpose,[6] and at a period of war or other publi

1. A court-martial has no authority to *assign* counsel. The cou however, or judge advocate, will properly advise an ignorant soldier o his privilege to be assisted by counsel if desired.

2. Page 53.

3. Page 132.

4. See 1 McArthur, 44; Hough, (A.) 38; Kennedy, 95; Hughes, 5 Macomb, 47; Benét, 94; DIGEST, 199. *Contra*, De Hart, 318. And s Tytler, 251.

5. Art. VI of the Amendments to the Constitution provides that "i all criminal prosecutions" the accused shall "have the assistance o counsel for his defence." The reference here is to prosecutions befo the *criminal courts of the United States*. Barron *v.* Mayor of Ba more, 7 Peters, 243; Ex parte Watkins, Id., 573; Twitchell *v.* Com 7 Wallace, 326; Edwards *v.* Elliott, 21 Id., 557; Walker *v.* Sauvin 92 U. S., 90; Pearson *v.* Yewdall, 95 U. S. 294; 1 Bishop, C. L. § 72 Wharton, C. P. & P. § 920. Military courts, however, though n bound by the letter, are within the spirit of the provision.

6. DIGEST, 77, 199; G. C. M. O. 25 of 1875.

emergency, when immediate action is called for, may even refuse to delay at all. So the court may sometimes properly decline to admit the particular person offered as counsel,—as where he is an attorney who has been prohibited on account of misconduct from practising in the executive departments, or an officer dismissed for cowardice or fraud and with whom officers are precluded from associating by the 100th Article of war, or a person of notoriously bad character, or who is otherwise clearly exceptionable.[1] Further the court may exclude a counsel guilty of disrespect or other improper behaviour in its presence, although such behaviour may not be of a sort made punishable by Art. 86.[2] But where counsel is thus excluded the court will ordinarily allow the accused a reasonable time for procuring other counsel if he desire it.

Status of Counsel. The strict rule which usage formerly prescribed in regard to the action of counsel on military trials, and especially enforced as against professional counsel, was such as to render their position embarrassing if not indeed humiliating. By this rule they were precluded from all *oral* communication, not being permitted to examine witnesses *viva voce*, or to address the court by statement, motion, or argument, but being required to express themselves either through the accused or in writing.[3] In his recent edition of 1875, (§ 476,) Simmons states that there

1. In G. O. 73, Dept. of the East, 1865, the admission of a regimental commander as counsel for a member of his regiment, before a court composed entirely of officers of the regiment, was commented upon as improper.

2. A counsel who was a military man would be liable to charges and trial under the circumstances. See the two cases of officers tried for improper conduct while acting as counsel, published in G. C. M. O. 37 of 1873; Do. 5, Dept. of the Platte, 1874.

3. No rule of military procedure has been more strictly insisted upon than this. See Tytler, 251; Delafons, 166; Hough, 673; Kennedy, 95; Napier, 93; Hughes, 53; Hickman, 74; Franklyn, 49; Gorham, 39; Macomb, 30; O'Brien, 236; De Hart, 132, 318; Gilchrist, 16; Gen. Hull's Trial, 14; Capt. Thos. Howe's Trial, 253. G. O. 7, 16, Dept. of the Mo., 1862; Do. 52, Dept. of the Pacific, 1865; Do. 52, Dept. of the Cumberland, 1868; Do. 32, Dept. of the Gulf, 1875; G. C. M. O. 113, Dept. of the East, 1871. This doctrine was carried so far in the British practice that professional counsel were not even allowed to read to the court the concluding defence or statement of the accused. Simmons 586, and other authorities above cited; also Gen. Whitelocke's Trial, 53; Lieut. Hyder's Trial, 106. Warren, (p. 153,) complains that, when acting as counsel before a court-martial, he was permitted only to communicate in whispers with his client.

has not been "any relaxation of the well-established rule courts-martial as to the silence of professional advisers and the taking no part in the proceedings. On the contrary it has be felt," he adds, that such courts should be "more than ever their guard to resist any attempt to address them on the part any but the parties to the trial." But the more recent radi reconstruction of the British military law has done away with t previous usage in this regard; and in the Rules of Procedure (§§ of 1881, it is declared that the counsel both of the prisoner and the prosecutor at a military trial shall have the same right as t party for whom he appears to call and orally examine and cro examine witnesses, as well as to make objections and statemen put in pleas, and address the court.

As to the practice before courts-martial of the United States, while the doctrine in question is quite strictly laid down in t treatises and in sundry Orders, the actual procedure has becom much more indulgent and reasonable; not merely military b professional counsel being in general permitted to examine t witnesses and address the court without objection on the part the members. Occasionally indeed the old rule is insisted up at the outset though relaxed later; but more frequently mo the same license is allowed at all stages as at an ordinary cri inal trial, subject however to a restriction of the privilege wh counsel by their prolixity, captiousness, disrespectful manner, other objectionable trait, fatigue or displease the court.[1] Th in practice, the old rule is mainly held in reserve, to be enforc by the court at its discretion in exceptional cases. Objection the reading of the final address, or to a closing oral or writt argument, by the counsel, is now of the rarest occurrence.[2]

1. In some of the cases in which the old rule was enforced, the co sel had either used "scurrilous" language, or had taken up time w inappropriate pleas or motions. See G. O. 16, Dept. of the Mo., 18 Do. 52, Dept. of the Cumberland, 1868; Do. 32, Dept. of the Gulf, 18

2. See G. O. 7, Dept. of the Mo., 1862; Do. 52, Dept. of the Paci 1865; also Gen. Porter's Trial, (1862.) In the history of military tri some very able arguments have been delivered by legal counsel; sa for example, as those of Hon. T. H. Benton on the trial of Lt. Col. F mont, of Hon. Reverdy Johnson on the Assassination Conspiracy Tr of Jas. T. Brady on the trial of Beall, and of D. D. Field on the cour inquiry in the case of Gen. A. B. Dyer. The ability of the argume of counsel before French *conseils de guerre* has been especially mark as for instance the argument of Berryer on the jurisdiction of the co in the case of Marshal Ney, and that of Lachaud on the merits at trial of Marshal Bazaine.

Counsel for Parties other than the Accused. The subject of the employment of counsel *to assist the judge advocate* will be remarked upon in Chapter XIII. Where the *prosecuting witness* is properly required to be present during the trial, counsel may be permitted to attend him if he desires it. Such attendance is not of frequent occurrence, but has been acceded to in sundry cases of unusual importance. Whether counsel to represent *other persons interested in the investigation* may be admitted should depend upon their relation, if any, to a recognized "party" in the case. In the leading case on the subject, that of Commander Mackenzie of the navy, in which such admission was applied for,—*viz.* by two counsel, (representing the relatives of the officer executed by order of the accused,) who asked to be allowed to be present, independently, at the trial and examine and cross-examine the witnesses, &c.,—the application was denied by the court. In the army such counsel might perhaps have been admitted on the application of, and to assist, the judge advocate, or prosecuting witness, if any, but scarcely otherwise.

VI. THE CLERK AND OTHER ASSISTANTS OR ATTENDANTS.

Here may be noticed the minor *personnel* of a military investigation, such as reporters, clerks, interpreters, guards, orderlies, and—where specially authorized—provost-marshals.

Reporters. The appointment of the official "reporter" being specially devolved by statute upon the Judge Advocate, his duties, &c., will be remarked upon in Chapter XIII.

Clerks. It is directed by the Army Regulations, par. 930, that—"Whenever it is necessary to employ a clerk to aid the judge advocate, the court may order it; a soldier to be procured where practicable."

An additional clerk for the judge advocate, or a clerk to assist the accused, may, in a case of sufficient importance, be specially authorized by the Secretary of War upon due application.

The court will in general properly fix the *per diem* compensation of a civilian clerk,[1]—which will be paid him by the Pay-

1. Soldiers, or other persons in the public service, are not entitled to compensation as clerks of courts-martial, if so employed. Army Regs., par. 933.

master,[1] on the certificate of the judge advocate, furnished him at the end of the proceedings and setting forth the number of days on which he has been employed.

Clerks, unlike reporters, are not required to be sworn.

Interpreters. Where any of the proposed witnesses are foreigners who cannot speak our language, or who speak it imperfectly, a competent person is procured by the judge advocate to act as an interpreter on the trial. Interpreters, in our practice, are summoned and paid as witnesses,[2] and sworn as such. Where a regular interpreter has not been obtained, one of the witnesses present may, if competent, be used as an interpreter of the testimony of the others;[3] or a bystander or even one of the court may be resorted to. In an important case, the accused may properly have summoned for him a person as interpreter, by means of whom to correct the translation of an interpreter summoned on the part of the prosecution.[4]

Orderlies, Guards, &c. The necessary attendant or attendants—orderlies, messengers, or guards—will properly be furnished, from the enlisted force present, by the post or local commander, on the application of the judge advocate, whose business it will be to act as messengers for the court and judge advocate, protect the court from disorder, guard public property in the court-room, &c.

Provost-Marshals. In cases of special consequence, involving unusual details of administration, the convening authority, if he deem it expedient, may detail an officer as *provost-marshal*

1. The annual Appropriation Acts, among the items of the appropriation for the Pay Department, specify—"Compensation of civil clerks and witnesses attending upon courts-martial, military commissions, and courts of inquiry."

The following regulation in regard to the compensation of civil clerks is contained in the Paymasters' Manual, p. 123, note: "When the rate paid exceeds $3 per day, the certificate of the judge advocate should show that the employment was ordered, and the rate fixed by the court, and that a competent soldier could not be procured."

2. Circ. 7, 9, 1884. Interpreters are not often required in our practice. The British authorities, especially with reference to their employment in India, are much more full than ours in regard to the qualifications, &c., of interpreters. See Simmons § 477–479; McNaghten, 1 Gorham, 40; Jones, 68; Rules of Procedure, 27 (D,) 71 (A,) (C.)

3. People *v.* Ramirez, 56 Cal. 533.

4. O'Brien, 259–260.

whose duty it will be to serve subpœnas, attachments and notices, take charge of prisoners and witnesses, enforce order in the court-room, and otherwise execute the mandates of the court and directions of the judge advocate. The attendance, however, of such an auxiliary official, though apparently not infrequent in the British practice,[1] has, with us, been more commonly resorted to before State militia courts[2] than before courts-martial of the United States. At the trial of the Conspirators against the life of President Lincoln, &c., in 1865, a "special provost-marshal" was assigned to attend the commission.[3] During the late war provost-marshals were frequently appointed or detailed as executive officials,[4] but, though sometimes acting as judges of provost courts,[5] they were rarely employed in connection with general courts-martial.

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1. See Simmons § 490. At an early period he executed sentences, and, originally, appears to have been an officer of the Marshal's Court. Grose, 59, 73.

2. See Maltby, 125; The Militia Reporter, pp. 9, 106, 159, 249; Trial of Lt. Col. Bache, (Pa. Militia,) p. 4.

3. DIGEST, 202, note.

4. Provost-marshals were appointed under the Conscription Act of March 3, 1863, as agents for enforcing the draft, arresting persons avoiding or obstructing the same, &c., under the orders of a Provost Marshal General. Besides these statutory officials, officers of the army were *detailed* to act as provost-marshals for the performance of multifarious duties in the large commands. Every duty indeed which did not clearly fall within the specialty of some particular branch of the service seems to have been devolved upon this invaluable class of officers. Among their occupations may be noted the arresting of marauders, straggler, deserters, soldiers without passes, spies, disorderly persons, persons violating the laws of war, prisoners of war without paroles, &c., the supervision of paroled prisoners, the execution of sentences of death and imprisonment, the examination of deserters from the enemy, the control of the business of sutlers and other traders, the issuing of passes and permits, the care of refugees and freedmen, the charge of captured property, the administering of oaths of allegiance, the regulation of the delivery of the mail and express packages and of the circulation of newspapers, the protection of private property, protecting elections, &c. Among the many Orders prescribing their duties the following may be noted: G. O. 60, 188, Army of the Potomac, 1862; Do. 10, Id., 1863; No. 35, Dept. of the Mo., 1862; Do. 22, Dept. of the South, 1864; Do. 5, Dept. of the Gulf, 1864; Do. 23, Dept. of Kans., 1864; Do. 4, and Circ. 3, Dept. & Army of the Tenn., 1864; Do. 65, Dept. of La., 1865; No. 1, Dept. of Miss., 1865; G. Field O. 3, Army & Dept. of West Miss., 1865; Circ. 12, Dept. of Va., 1865.
The provost-marshal is still recognized in the military code—in Art. 1—as an officer who may have charge of prisoners. See Chapter IX.

5. See PART II.

CHAPTER XII.

THE PRESIDENT AND MEMBERS.

It is with the appearance of the accused that the capacities, individually and relatively, of the other persons concerned in the proceedings begin to have the special significance which they carry through the trial. It will be well therefore to consider here the peculiar functions of the President and Members, and then of the Judge Advocate.

THE PRESIDENT.

Who he is. In the British law, the president of a general court-martial is a distinct official appointed as such separately from the other members. In our law, prior to 1828, he was in general expressly detailed as such. Since that date he has been simply the *senior member*, and no specific designation of a president is now ever made in Orders convening military courts in our service.

The senior in rank of the officers named in the convening order, if present at the assembling of the court, becomes president; if not present, the senior of those who *are* present presides, till a senior to himself arrives or is added to the court. If the presiding officer is removed by any casualty, or is relieved or absents himself, the senior in rank of the members remaining succeeds him. Throughout the trial it is the senior for the time being who presides. If a junior member is promoted in the army above the senior pending the trial, such member becomes president. It is immaterial what may be the actual rank of the senior,[1] or to what branch of the service he belongs: he is president solely because of his seniority in rank in the army to the other members.

1. In the British law, the president of a general court, (except in certain special cases,) "shall not be under the rank of a field officer." Act § 48, (9.)

His Functions—As Presiding Officer. The only *statutory* nction assigned to the president by our law is that of adminis- ering the oath to the judge advocate, required of him by the 85th rticle of war. The Army Regulations, par. 883, (employing e language of the Secretary of War in the case of Backenstos,[1]) clare that—"The president of a court-martial, besides his du- s and privileges as a member, is the organ of the court to keep der and conduct its business. He speaks and acts for the court each case where the rule has been prescribed by law, regulation, its own resolution." According to the function here assigned m, the president opens the court and calls it to order; announces adjourned at the close of the session, when adjourned by vote the majority, or at the hour required by Art. 94; preserves der during the session, checking anything like disorder or in- corum on the part of the members of the court, the judge vocate, the accused, the counsel,[2] the witnesses, or the audi- ce, while at the same time seeing that the rights of every one titled to consideration are respected;[3] conducts the routine of ch day, calling for or announcing the proper proceedings in m, and takes care that the regular forms of business are duly served. In the absence of objection, he may direct as to the re familiar points of order and procedure, and will properly e the formal action incidental to the deliberation of the court— h as the submitting to the court of a proposition or motion by member,[4] the ordering of the court-room to be cleared at the re- st of a member, the declaring of the decision of the court r deliberation had, &c. So, in the absence of objection, or ere the acquiescence of the court is to be presumed, he may e assent to a member or the judge advocate leaving his seat a temporary purpose, to a brief consultation between the used and his counsel, or other slight matter of indulgence or nity. But in such and all other cases in which he acts as pre- ing officer, he simply acts for and in the name of the court. er than as its representative and mouthpiece he has no sepa-

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. See G. O. 14 of 1850, also cited *post.*

. Note in this connection the 1st Specification in G. O. 37 of 1873.

. "He is responsible that every person attending the court is treated proper respect." Jones, 70. And see Gorham, 33.

The president is not authorized to decide that a proposition ad- ced by a member shall not be submitted to the vote of the court. C. M. O. 55, Dept. of the Mo., 1884.

rate authority. He can neither act independently of the cou nor can he act against the will of a majority of the court.[2] the other hand he cannot trench upon the authority of the C mander—as by excusing a member from attendance,[3] &c.

As a Member. In deliberating, voting, and on all occasi of judicial action, the president, in our law, simply counts a member. As a member he is but the equal of the other memb Upon a question or issue raised he may state his views like other member, but it is for the *court*, by a majority, to deci In the British service, "in the case of an equality of votes on sentence, or any question arising after the commencement of trial except the finding," the president is given a casting vo In our law he has no casting vote on any occasion, his counting for no more than the vote of any other member.[6]

As Channel of Communication with the Comman As the official organ of the court it is through him that comm cations from the convening or reviewing officer should in gen be made to the court, and by him that the court should com nicate with that authority. As Jones[7] writes of the same offi in the British law:—"He is the channel of communication tween the court and the convening authority." With us this is deemed to be the regular and official course, though judge advocate has not unfrequently been made the medium.

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1. As by assuming of himself to revise the record. See DIGEST,

2. See G. O. 14 of 1850, in which the action of Lt. Col. Backens in assuming as president to adjourn the court against the vote of majority, is condemned as wholly unauthorized and irregular. In cent Orders of the Dept. of Dakota, (G. C. M. O. 89, 165, of 1882,) point is noticed that the president is not authorized to appoint a da which the court shall adjourn or the trial be continued, or to cha the day which has been fixed by the court.

3. See G. O. 2, Dept. of the Mo., 1862.

4. G. C. M. O. 55, Dept. of the Mo., 1884.

5. Army Act § 54 (8.)

6. DIGEST, 392.

7. Page 70. And Gorham, (p. 33,) observes:—"The president in the name of the court *in correspondence*."

8. "Strictly, communications from the convening authority to court as such, (and *vice versa*,) should be made to, (and by,) the p dent as its organ; communications relating to the conduct of the *ecution*, to, (and by,) the judge advocate." DIGEST, 205.

As a Source of Command. The president of a court-martial has no command as such. He cannot, as such, issue an *order*, properly speaking, to a member or the judge advocate, or to any other military person present. A failure, however, to comply with his reasonable and proper directions in keeping order and conducting the business of the court, while it will not subject the delinquent to a charge of disobedience of orders in violation of Art. 21, will render him amenable to trial under Art. 62.[1] The president may call upon members who have absented themselves from a session, or part of one, for an explanation of such absence, but in such requirement, or any other which he may properly make, he does not act in the capacity of superior or commander, and if his requirement is not duly complied with he can only, (in concurrence with the other members,) report the fact to the convening authority for *his* action.[2]

As Authenticating Officer. The Army Regulations, par. 914, direct that the president of a court-martial shall, (with the judge advocate,) authenticate its record and certify the sentence pronounced by it in each case. These acts must be performed by the member who is the senior in rank of the members present at the completion of the proceedings, although during all the proceedings prior to the final another officer may have been senior and president.[3] The *form* of his authentication, &c., will be indicated in treating of the Record.

THE MEMBERS.

A Majority to Govern. We have seen that the law gives to each member, the president included, an equal voice, and it is to be added that all questions and issues, which are required to be passed upon by the court in the course of the proceedings, are decided by a majority vote. This general rule applies to the questions which arise upon the finding and in the adjudging of the sentence equally as to the questions and issues raised by challenges, special pleas, objections to testimony, applications for continuance, motions and other interlocutory proceedings; and to questions raised by or among the members themselves equally

1. DIGEST, 392.
2. G. C. M. O. 29, Dept. of Texas, 1884.
3. DIGEST, 418.

as to those raised on the part of the accused or judge advocate. The only exception to the rule is that prescribed by Art. 96—that a two-thirds vote shall be required to adjudge a capital sentence. But the finding of guilty which must precede such a sentence may be arrived at by a majority as in all other cases.

Tie Vote. All the members must vote where a vote is required, but a tie vote, when they are of an even number, is no vote, or rather is not a majority and can have no effect as such. That is to say, a proposition upon which the vote is a tie is not carried.[1] The application of this principle to the finding and sentence will be illustrated hereafter.

Mode of Voting. As to the manner of voting the only provision of the written law is that of Art. 95, that:—"Members of a court-martial, in giving their votes, shall begin with the youngest in commission," *i. e.* the junior member. The main object of this provision, which, taken from the then existing British code,[2] first appeared in our original Articles of 1775, appears to be to secure the members junior in rank from being influenced in their opinions by the views of their seniors. "In no other way," observes Clode,[3] "could this freedom be secured." The form and rule of voting which usage has prescribed in deliberating upon the Judgment will be noticed in a subsequent Chapter.

The Members to Act as a Unit. Whatever may be the personal opinions of individuals, and however slight may be the majority by which a result is arrived at, the members in their decision and action must be and appear as a unit. That this is required is but an illustration of the principle that all military action must, as far as practicable, be summary, final and conclusive. Thus a ruling upon a plea or exception is the ruling not of such members as have concurred in it, or of such a majority, but of the court, a finding is the finding of the court, a sentence is the sentence of the court—as a unit. The law ignores differences of opinion—majorities or minori-

1 [illegible]

2 See Art. VII or Sec. XV of 1765, in Appendix. Its original is found in the "English Military Discipline" of James II. See Appendix.

3 Mil. Law, [illegible] to a similar effect, 2 McArthur, 259; Tyler, [illegible] De Hart, [illegible]

ties—*in the result*, and even prohibits the disclosure of the votes and opinions by which such result has been attained. With the civil tribunals a majority of the judges pronounce the judgment of the court, but who constitute the majority is made known, and the minority may, and often do, express their dissenting views.[1] With military courts all dissent is merged and lost in the conclusion reached, whatever it may be, of the court, which thus, to the parties, the public and the readers of its record, appears as an integral and indivisible whole. In view of this principle, no act performed by a part of the court can be legal,[2] nor can an individual member be permitted to take any official action independently of or counter to the court. Thus a member or members cannot legally enter upon the record a protest against a ruling or judgment of the majority, *i. e.* the court, however erroneous or unjust the same may be. So, the president or a member cannot, on a revision, correct an error in the recorded proceedings, but the correction must be made as the act of the court. Individual members may make, independently or in combination, a recommendation to clemency, but this is because the same is a *personal* act, not an official proceeding of the court. These illustrations of the general principle will be separately recurred to hereafter.

Not to Assume Incompatible Functions. Status as a Witness. For example, a member, while acting as such, cannot, at the same time, properly act—even temporarily and briefly—as judge advocate, in recording the proceedings or otherwise.[3] Nor can he, while remaining, *i. e.* without being relieved as, a member, act as counsel for the accused.[4] He may indeed, without affecting the legality of the proceedings, testify as a witness, even where there are with him but five members present, since, in so doing, he is not disqualified as, and does not cease to be, a member.[5] But, except when called to testify merely as to

1. So, where *juries* disagree, the numbers on either side are commonly (though generally irregularly and improperly) made public.

2. See Simmons § 530.

3. DIGEST, 204, 297. And see G. O. 2, Dept. of the Platte, 1868.

4. DIGEST, 200; G. C. M. O. 62, 1874; G. O. 134, Dept. of the Mo., 1863; Do. 119, Id., 1867; Do. 29, Dept. of the Lakes, 1870.

5. DIGEST, 322, 483; Sullivan, 58; Simmons § 511, 947; Clode, M. L., 127–8; G. O. 11, Dept. of the N. West, 1864. And compare People v. Dohring, 59 N. Y. 374, 377, where, one of the judges necessary to

character, it is most undesirable that a member shou in the position of a material witness upon a trial w act as a judge.[1] In this connection Gilchrist[2] obser is ascertained previous to the assembly of the co evidence of an officer nominated on a court-martial he should be immediately relieved; and if a member, his seat and being sworn in, is called on to depose to demands that he should not resume his seat as a me cide on evidence he has himself given." So, in a G during the war,[3] the appearing as a witness by a me favored "for the reason that the facts to which he c to some extent be colored with his opinions," and be he resumes his seat, he will have "to decide between t credit to be given to the testimony of other witnesses with his own." But some exigency of the service, or a small number of officers are available for court-m will now and then prevail against considerations of t and require that an officer personally informed of the case to be tried should be placed upon the detail and the court.[4] In such a case it is better that the of testify openly as a witness on the stand subject to cro tion than that he should be exposed to the temptat municating his knowledge to his fellow member court—a proceeding wholly condemned at military l

Absence of Member from Court. The deta officer as a member of a court-martial is an *order* re

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complete the court having testified as a witness at the tria that—his "mere absence from the bench, while he was i box, did not affect the jurisdiction of the court." On Gen. trial, Brig. Gen. King, a member of the court, testified a the merits for the prosecution, without objection by the accu Trial, p. 203–205. On the trial of Lieut. Devlin of the N in 1852, three of the nine members of the court testified a the merits.

1. DIGEST, 322, 483. And see Sullivan, 58.

2. Duties of a Judge Advocate, p. 9.

3. G. O. 11, Dept. of the N. West, 1864.

4. That is to say, if not challenged off as he properly knowledge has in fact prejudiced his mind. See Chapter

5. Simmons § 947; Griffiths, 112; Maltby, 68. That a legally be based upon the individual knowledge of a memb ter XIX.

ttend and act as such: moreover when an officer has been detailed for a trial, the accused has a certain right to his sence, if not duly excused or prevented by some sufficient se from attending.[1] It is clear that a member cannot declare nself to be ineligible, or on any other ground excuse himself m attending;[2] and further that, if not regularly excluded upon allenge, he can be excused only by illness, or some stringent d for the time insuperable casualty or emergency.[3] When revented from attending by sickness or other controlling cause, the member is required by the usage of the service to communicate to the president or judge advocate the cause of his absence, so that the same may appear explained upon the record.[4] If the absence is occasioned by sickness, the officer should forward a proper medical certificate in reference to the same, and this should be appended to the record.[5] A court-martial may in general properly adjourn for a short interval to await the recovery of a member temporarily indisposed.[6]

An obligation to explain his absence—the cause of his detention—rests also upon a member who attends the court at a late stage of a session, or after having failed to be present at a previous session. As already indicated it is proper in such a case for the presiding officer to call upon the member for the explanation due, and if he refuses to give one, or gives a frivolous or

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1. See G. O. 4, Div. Atlantic, 1874.

2. See G. O. 66, Dept. of the Platte, 1871.

3. G. O. 60, Dept. of the Platte, 1871. That a member was attending a post council of administration has been held an insufficient excuse, for the reason that the attendance on the general court-martial, enjoined as it was by a superior commander, was a paramount duty. G. O. 10, Dept. of the Lakes, 1867. So it was held an insufficient excuse that the member was engaged on 'other duty at the post,' since a post commander, unless in some exceptional emergency, is not authorized to place or retain officers on duties interfering with their due attendance on general courts. G. O. 106, Dept. of Dakota, 1871.

4. DIGEST, 320; Simmons § 526; G. O. 50, Dept. of the East, 1863. It is not sufficient to *record* that the cause of absence is 'unknown,' where the same may be readily ascertained by the court. G. O. 8, Dept. of the Gulf, 1873.

5. See G. O. 44, Dept. of the Platte, 1871.

6. Simmons § 526. Hough, (P.) 712, mentions a case in which, a member being sick, the court assembled at his quarters.

insufficient one, he becomes amenable to a charge for the offe involved.[1]

Return of Absent Member as affecting Legality Proceedings. The question has been considerably discus whether a member who has been absent during a material p tion of a trial may legally return and resume his seat. In majority of the treatises it has been declared that, where evide has been received during the member's absence, he cannot permitted to return and act as member without invalidating judgment of the court.[2]

In this country, however, the military practice has not in g eral accorded with this doctrine. In 1814, upon the quest being raised upon the trial of Brig. Gen. Hull and submitted the Secretary of War for decision, it was formally held by l that a member who had been obliged to absent himself for interval from the court could properly return and resume functions, providing the proceedings had and evidence ta during his absence were read to him as recorded.[3] In c sequence of this ruling, a member who had been absent on count of illness for four days on each of which evidence introduced for the defence, was, with the assent of the accu re-admitted to the court,—the testimony received in the inte being first read to him,—and continued on the court to the cl taking part in the findings and sentence. On Capt. D. Port trial in 1825,[4] when on two occasions a member became sick unable to attend, the court proceeded with the case with express understanding, concurred in by the accused, that w the member returned, (as in each instance he did,) the proc ings had during his absence should be read to him from record. On Com. Mackenzie's trial in 1843,[5] a member who been absent for two days during which no testimony had l received was re-admitted; but the same member, having su

1. The law on this subject is pointedly illustrated in a late case i C. M. O. 29, Dept. of Texas, 1884.

2. Hough, 666; Simmons § 530; Franklyn, 46; Tulloch, 5 Jones, 72; Gorham, 35; O'Brien, 260; De Hart, 92. And see, similar effect, II Opins. At. Gen., 414; IV Id. 7.

3. Printed Trial, Ap., p. 29. And see DIGEST, 320.

4. Printed Trial, pp. 367, 376.

5. Printed Trial, pp. 9, 107.

quently been absent sick for three days during the taking of evidence, it was decided by the court on his return that he should be "excused from further attendance." One of the charges in this case—it is to be remarked—was "murder." On Com. Wilkes' trial in 1864,[1] two members who had been absent on account of illness during the hearing of testimony returned and resumed their seats without objection, the proceedings had and evidence received meanwhile being read to them. In the case of one of them the testimony was read in the presence of the two witnesses who had testified in the interim, they pronounced it correctly recorded, and the member declared that he had no questions to put to them. On the trial by military commission of Dodd and others in Indiana, in 1864,[2] wherever members were absent through sickness or other unavoidable cause, the trial was, with the consent of the accused, proceeded with; the members, with the same consent, subsequently resuming their seats and having read to them the testimony introduced in their absence. In Capt. Downing's case, where a member who had been absent for two days on account of illness was not permitted by the court to resume his seat, the opinion was expressed, (in 1855,) by Atty. Gen. Cushing,[3] that the court had no such power to exclude the member, and that "whether the absent member shall act or not upon his return must depend upon his own views of propriety and not upon those of the court."

In our present practice, members who have absented themselves during the hearing of testimony retake their places in general without objection; and that their action does not affect the validity of proceedings or sentence, (provided five members have meanwhile been present,) is believed not now to be questioned. Such action, however, (which is not indeed frequent,) is irregular and certainly not to be encouraged;[4] and Mr. Cushing, in the opinion last cited, has noted how much less satisfactory it must in general be to hear testimony read than to receive it from the witnesses in person, observing at the same time their manner and bearing. Where indeed there is reason to believe

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1. Printed Trial, pp. 136, 145.
2. Printed Trial, pp. 9, 73.
3. VII Opins., 98, 102, 103.
4. See G. O. 78, Dept. of the Cumberland, 1867; G. C. M. O. 80, Div. of the Pacific, and Dept. of Cal., 1880.

that such action may have resulted in any injustice or materi disadvantage to an accused party who has been convicted, th fact will properly induce a disapproval of the findings and sen tence or a mitigation of the punishment adjudged.[1]

Introduction of a New Member Pending the Tri The above-cited ruling of the Secretary of War on Gen. Hull' trial covered also the case of a *new member* who, it was hel could be added to the court in the course of the trial, witho affecting the validity of the subsequent proceedings, provided h were made acquainted with the proceedings had prior to hi introduction. No new member was actually detailed on th trial. The ruling, however, has been recognized in our practi as authorizing the convening authority to add a member o members to the court pending the trial, where necessary to pr vent a failure of justice by reason of the court, in an importa case, being reduced by some casualty below five.[2] This subje has already been remarked upon in the Chapter on the Compo tion of General Courts.

Change of Rank or Status of a Member while o the Court. That an officer is promoted while acting as member of a court-martial affects in no manner his capacity o the court. The *fact* is properly noted in the record, and m

1. DIGEST, 321. In repeated cases of trials during the war, in whic members who had been absent during the hearing of material evidenc were re-admitted, to participate in the trial and judgment, and it d not appear that the accused had assented to such re-admission, the pr ceedings were disapproved by the reviewing authority. See G. O. 9 Dept. of the Ohio, 1864; Do. 36, Mid. Mil. Dept., 1865; Do. 66, De of the Platte, 1871; Do. 2, Id., 1868; Do. 5, Dept. of N. Mexico, 18 Do. 86, Dept. of the South, 1864; Do. 44, Dept. of the East, 1865; D 13, Id., 1866; Do. 107, Dept. of the Mo., 1863; Do. 76, Second M Dist., 1868; Do. 54, Fifth Id., 1870. In most or some of these ca the action taken was probably induced by a consideration of possi injustice done the accused.

2. As to the undesirableness of such a measure, where it can b avoided consistently with the interests of the service, see DIGEST, 32 G. G. M. O. 9, Dept. of Texas, 1883. In the General Orders, while t introduction of new members has been treated as an irregularity, it h not in general induced a disapproval of the sentence, except where it not appear from the record that the member had been made acquai with the evidence taken before his appearance. See G. O. 99, Arm the Potomac, 1862; Do. 46, Dept. of the East, 1864.

perhaps give the officer precedence over another member or members and thus change his seat, but this is all.

If a member of a court-martial receives notice that he is retired, or is dismissed or discharged from the service, or that his resignation has been accepted, the fact should be at once noted on the record and the member should thereupon vacate his seat. A retired officer is not eligible to sit upon a court-martial, and an officer, upon being dismissed or discharged, or upon his resignation taking effect, becomes forthwith a civilian.[1]

Behaviour of the Members. It is quaintly announced in Art. 87, that—"All members of a court-martial are to behave with decency and calmness," a directory provision dating back in our law to the Articles of 1775, which derived it, in substance, from Art. 48 of the Code of James II. It will be of course for the president, "the organ of the court to keep order," to require an observance of this Article in the first instance.[2] A member who fails to behave with decency and calmness, *i. e.* behaves in a disorderly and disrespectful manner, especially after a warning from the president, though not liable to be proceeded against as for a contempt under Art. 86,[3] will of course be subject to charges under Art. 62 or Art. 61, and this indeed independently of the provision of Art. 87. In a few cases published in Orders, members of courts-martial have been tried for drunken and disorderly conduct and disrespectful language in the presence of the court and severely sentenced.[4]

Their Course upon the Investigation. While the members may, and in practice not unfrequently do, not only put questions to the witnesses for the purpose of bringing out facts or elucidating the issue, but also take exceptions to ques-

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1. DIGEST, 321–2. In G. O. 104, Dept. of Ky., 1865, the proceedings in fifteen cases are disapproved for the reason that a member of the court acted thereon for part of a day, after having received notice of his muster-out of service.

2. See Hough, 375.

3. G. O. 14 of 1850; Army Regulations, par. 884.

4. See G. O. 1 of 1858; Do. 66, Dept. of the Mo., 1866; G. C. M. O. 9, Fourth Mil. Dist., 1867. That members should not commit the disorder of vacating their seats before the president has announced that the court has adjourned, is noticed in G. C. M. O. 55, Dept. of the Mo., 1884.

tions proposed in the course of the examination, it is no[illegible] patible with their function as judges to assume a contro[illegible] attitude or anything like an active part upon the trial. I [illegible] cent case in the Department of Dakota, it is remarked by Ge[illegible] Terry, that 'members of courts-martial are not of counsel eithe[illegible] for the government or the accused, and it is no part of their busi[illegible]ness to try a case as such counsel,' and that therefore "the frequent interposition of objections by members of a court is a vicious practice and should be discountenanced."[1]

Special Obligation of Members on being Sworn. The obligations devolved upon members of courts-martial o[illegible] taking the oath prescribed by Art. 84 will be considered i[illegible] Chapter XV.

Personal Liability of Members. The *civil* liability o[illegible] members to persons aggrieved where the court has proceede[illegible] without jurisdiction or otherwise illegally, or has imposed a[illegible] illegal punishment, is a subject which will be considered i[illegible] PART III of this work.

As to liability to *military* arrest and charges—the fact that a[illegible] officer has been detailed and is acting as a member of a cour[illegible] martial exempts him, as already noticed, in no manner fro[illegible] either. Indeed an officer who by the commission of a substanti[illegible] military offence has made himself liable to arrest and tri[illegible] should not be allowed to remain on court-martial duty. If i[illegible] can be avoided, however, an officer should certainly not b[illegible] placed in arrest while sitting upon the court as a member: th[illegible] proceeding of arrest should be deferred till the close of the day[illegible] session or at least to a recess of the court.[2]

Liability to Perform other Duty while Member[illegible] [illegible] of the Army Regulations [illegible] the employment of officers who are members [illegible] assembled at posts at or near which they a[illegible] [illegible] officers serving as members of courts at

[illegible] Dakota, 188[illegible]. Do. 49, Id., 1883.

[illegible]

[illegible] the Regulations of 1863 explained and modifi[illegible]

[illegible] on this subject in G. O. 5, Div. Paci[illegible]

: from their proper stations, the general rule is that they to be regarded as subject to orders requiring them to per- her duty while they remain members. In an emergency they may be so required; but in such a case the court will, ral, be dissolved or adjourned, or the member or members for different duties be relieved.

ıority to Recommend to Clemency. This, which ılly *personal*, *i. e.* unofficial, authority which members of ıartial may exercise in relation to the accused, will be :ed in its proper order in connection with the subject of tence, in Chapter XX.

CHAPTER XIII.

THE JUDGE ADVOCATE.

Early Use of the Term. The province of the Judge Advocate, as now understood, appears to have first become defined in the British Articles of the seventeenth century.[1] The term "Judge," at present without significance, may be deemed to be derived from the remote period when the officer who corresponded in a measure to the later judge advocate, (or "judge-martial," as he was once also styled,)—notably the *Schultheiss* of the early and the Auditor (*Auditeur*) of the later German military law,—exercised a species of jurisdiction of their own; the latter official named having a vote on the court.[2]

The Existing Law. The statutes which relate to the appointment, duties, powers, &c., of judge advocates of American courts-martial are the 74th, 84th, 85th, 90th, and 113th of the Articles of war, and Secs. 1202 and 1203, Revised Statutes. Some of the details of their employment are regulated by paras. 882, 889, 892, 893, 914, 915, 917, 918 and 919 of the Army Regulations. Their function, however, is to a considerable extent determined by the usages of the service. These provisions and usages will be referred to in the course of this Chapter, the subject of which will be considered under the heads of:—I. The Appointment of the Judge Advocate; II. His Authority and Duties.

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1. See the "English Military Discipline" of James II, of 1686; also Articles of war of Charles II, of 1666. This officer is also mentioned in the original Mutiny Act of 1689.

2. Von Molitor and other German authorities noted in Chapter V. And compare the provision, as to the "Advocate of the Army," in Art. 1, (Sec. VI,) of Charles I. Another view of the term "Judge" appears to be that it was applied as substantially synonymous with *Assessor*, the Judge Advocate being regarded as present with the court in capacity of a *quasi* judicial adviser. See Clode, M. L., 126; Id., 2 [illegible], 304.

THE APPOINTMENT OF THE JUDGE ADVOCATE.

ıe Earlier Law on the Subject—Provision of Art. as affected by Art. 74. The statutory law authorizing detailing of judge advocates was confused and uncertain till e clear by the introduction in the revised code of 1874 of a and simple provision—in Art. 74—that, "*Officers who may ·int a court-martial shall be competent to appoint a judge ·cate for the same.*" Prior to the revision, the statutory ıority for the purpose was that expressed in Art. 69 of 1806, repeated in the present Art. 90, as follows: "*The Judge ·ocate, or some person deputed by him, or by the general or ·r commanding the army, detachment, or garrison, shall pros- ·e in the name of the United States.*"

he original of this provision was the early British article[1]:— he Judge Advocate General, or some person deputed by him, l prosecute in His Majesty's name." This, in our code of), was expressed in precisely the same terms except that, in e of the last three words, was substituted—"the name of the ted States of America." The succeeding Articles of 1786 cribed that prosecutions before courts-martial should be con- ed by "the Judge Advocate," (as the Judge Advocate Gen- was indifferently styled in the Resolutions of Congress prior ıe Constitution,[2]) "or some person deputed by him, or by the ·ral or officer commanding the army," &c.

fter the adoption of the Constitution, the Act of March 3, , in reorganizing the military establishment, and making ision for a single Brigadier General as the officer highest in : in the army, provided further for a "Judge Advocate." office, however, was discontinued by the operation of the of March 16, 1802, by which it was at the same time enacted :—"*Whenever a general court-martial shall be ordered, the ident of the United States may appoint some fit person to act udge advocate, * * * and in cases where the President ' not have made such appointment, the Brigadier General or ident of the court may make the same.*" In the code of

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See Art. VI of Sec. XV, of 1765, in Appendix.

During the Revolutionary war the most important prosecutions, as those of Maj. Gens. Arnold, Lee, Schuyler, and St. Clair, Lt. Enos and Zedwitz, and Major André, were conducted by Lt. Col. Tudor or Col. John Lawrance, as Judge Advocate General.

Articles of 1806, the provision of 1786 was re-enacted in Art. 69 But as there was at that date no "Judge Advocate" of the Army, this article did not substantially affect for the time the operation of the Act of 1802.

Maltby[1] cites this Act as in force in 1813. O'Brien[2] and De Hart[3] refer to it as in operation at the dates of their treatises, January and August, 1846. As late as in 1840 we find a General Order,[4] (issued from Army Headquarters,) authorizing the president of a general court to appoint the judge advocate. But meanwhile the specific officer designated in the Act as "the Brigadier General" had ceased to exist as such; and in March, 1849, the office of Judge Advocate of the Army was revived by Congress.[5] After this date the provision of 1802 became practically obsolete, the Articles of war being now treated as the source of the authority for the detailing of judge advocates for courts-martial.

There were, however, no *deputations* of judge advocates ever made by the officer appointed Judge Advocate under the Act of 1849,[6] and thenceforth the judge advocate was invariably detailed by the authority convening the court, *viz.* the President as Commander-in-chief, or the competent military commander. This usage, based apparently upon a liberal construction of the term "army" in the then Art. 69 as properly including the "department" command referred to in Art. 65,[7] had prevailed to the date of the recent revision in 1874. Meanwhile—it may be added—no deputations of judge advocates for general courts were ever made by the Judge Advocate General, or by any officer of the corps of Judge Advocates of the Army created by the Act

1. Page 123.

2. Page 353. And see Id., p. 229.

3. Page 307.

4. G. O. 19 of 1840.

5. Meantime certain "division" judge advocates had been authorized by Acts of 1812, 1816 and 1818, and appointed, but their appointment did not materially modify the operation of the existing law. The last of these temporary officers were done away with by an Act of June, 1821.

6. The author, having discovered no such deputation of record, further verified the statement in the text by a personal reference to the officer himself the late Major John F. Lee.

7. De Hart, (p. 307-8,) refers to the "broad interpretation" given to the existing law on this subject.

of 1862,[1] and none have been made to the present time, although the provision of Art. 69 of the code of 1806, authorizing such a deputing by the "Judge Advocate" has, as already indicated, been continued in Art. 90 of the present code, above cited.

It is thus perceived that, as heretofore remarked, the present Art. 74, which is at once a declaration and an enactment of a long-prevailing usage, comprises in brief the existing law on the subject of the authority to appoint judge advocates for military courts; the provision of Art. 90 being now quite unimportant and in part obsolete.

Construction of Art. 74. This statute is simple and easy of construction. A few points, however, may be noticed under it—upon some of which express rulings have been made—as follows:

1. The Article not only an authority but a requirement. Considered by itself this article is simply an enabling statute, but considered in connection with Arts. 84 and 85, and especially the former which prescribes the administering of the oath by the judge advocate to the members of the court, it must be construed as a requirement,—as in substance enjoining that whenever a court-martial is appointed a judge advocate shall be appointed for it. And this construction accords with the long-continued usage of the service in regard to the ordering of general courts.

2. It applies to inferior as well as general courts. But the above reasoning is equally applicable to the ordering of regimental and garrison courts, since Art. 84 requires that the oath shall be administered to the members of these courts also by the judge advocate. That judge advocates are to be detailed for *garrison* courts is also apparently contemplated in Art. 90. The Judge Advocate General, therefore, in December, 1879, held that the authority conferred by Art. 74 was not to be regarded as

1. This corps, by Act of July 5, 1884, was, with the office of Judge Advocate General, consolidated into a "Judge Advocate General's Department" comprising one Brigadier General, one Colonel, three Lieut. Colonels, and three Majors. These officers, like those of the original corps, while sometimes detailed as judge advocates of general courts-martial in special cases, have other and various functions as the law-officers of the Army.

restricted to officers empowered to order general courts but equally exercisable by those empowered to order inferior cc under Arts. 81 and 82. This view was soon after adopted announced by the Secretary of War,[1] and judge advocates l since been detailed for regimental and garrison equally as general courts-martial, in our army.

3. By whom the authority may be exercised. It is effect of the Article that the judge advocate is to be appointed, in practice he *is* appointed,) by the commander who, (being ther empowered by the Articles of war,) convenes the court-mart By the almost invariable usage of our service the court is orde and the judge advocate appointed in and by the same Order. T authority to detail the judge advocate cannot be delegated tc assumed by an inferior or other commander. At an early perio between 1821 and 1838—a practice, imitated from the Brit service, prevailed in our army, of delegating, in Orders from War Department, (or Headquarters of the Army,) appoint courts-martial, to the commander of the post at which the cc was to assemble, the authority to select and detail the judge vocate for the same.[2] But such practice, which was with warrant in the Articles of war, has been long since discontinu and at present the members and the judge advocate are invaria alike detailed by the officer ordering the court; nor would a cc mander of less authority be empowered to relieve a judge ad cate so detailed or to appoint a new one. Thus, in a case in 18 where an inferior ("District") commander to the Departm commander who ordered the court, detailed a judge advocate the same, in the absence of the judge advocate originally pointed by his superior, the proceedings were disapproved by latter as reviewing authority.[3]

Nor of course can the *court* appoint a judge advocate, even a temporary purpose. Thus it was held by the Judge Advoc

1. In G. O. 15, of February, 1880, since declared by the same thority to be mandatory in its terms. See DIGEST, 296, note.

2. The last order of this kind noted by the author is dated March 1838. In most of the cases the court was ordered to meet at W Point; in the others at Fort Monroe, Fort Leavenworth, or Jefferson B racks. The delegation, by the same class of Orders, of the autho to detail also *members* of the court, has been noticed in a previ Chapter.

3. G. O. 70, Dept. of the Mo., 1863.

eneral[1] that a court-martial was not empowered to direct its unior member to act in the place of the regular judge advocate where the latter had been relieved in the course of a trial without a successor being appointed. In a similar case in the Department of the Platte,[2] where a court had assumed to appoint one of its members judge advocate on the occasion of the one appointed in the convening order being temporarily called to take the stand as a witness, the proceedings and sentence were disapproved by the Department commander.

4. Extent of the authority. The authority conferred by the Article is not exhausted by the detailing of a judge advocate for the court at the outset. The judge advocate originally appointed may be prevented by illness from continuing the prosecution, or by reason of his promotion or some exigency or incident of the service, other duties may properly be devolved upon him. In any such case the officer by whom he was appointed, (or his successor in the command,) may relieve him and appoint another in his stead,[3] and this proceeding may if necessary be repeated.[4] That the judge advocate cannot relieve *himself* from any part of his duty need hardly be added.[5]

5. Eligibility for appointment as judge advocate. There is nothing in the present Article or elsewhere in the code to preclude the employment of enlisted men as judge advocates;[6]

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1. DIGEST, 204, 297.

2. G. O. 2 of 1868. And see an almost identical case in G. C. M. O. 27, Navy Dept., 1882.

3. DIGEST, 297; Simmons § 532; Hough, (P.) 706–7; Clode, M. L., 126; O'Brien, 260.

4. In a case published in G. O. 54, Dept. of the East, 1864, it is noted that three judge advocates officiated successively during the trial.

On the other hand, the same officer may be appointed as judge advocate for a number of successive or different courts-martial, provided he e detailed anew in a separate order for each separate court. DIGEST, 36.

5. That the judge advocate cannot, even with the concurrence of the urt, excuse himself from officiating—a point now too well established r discussion—was in substance ruled at the trial of Gen. Wilkinson, 1815, where the judge advocate having 'begged leave, with the rmission of the court, to decline' to undertake the responsibility volved upon him, it was held by the court 'that it was his duty to oceed with the trial.'

6. The most recent recorded instance known of an enlisted man acting

the usage of the service, however, has sanctioned the app ment as such of commissioned officers only.

Under the general terms of Art. 74, an officer of any cor branch of the service, whether of the line or staff, may be tailed as a judge advocate.[1] While judge advocates are commonly selected from officers of the line, it is by no m unusual to detail staff officers as such at remote posts or w the command is supplied with but a limited number of officers. Under such circumstances, assistant surgeons espec have been thus employed,[2] and the corps of post chapl (though its members are legally eligible therefor,[3]) is the one from which such details are not from time to time m As already indicated, officers of the Judge Advocate Gene Department of the Army are sometimes resorted to for the duct of prosecutions of unusual importance.

Nor does the *rank* of the officer affect his eligibility unde Article.[4] A general officer may as legally be appointed a j advocate as may a lieutenant. Except, however, in the rare in which the Judge Advocate General or a Deputy Judge A cate General officiates, the rank of the officer detailed as j advocate is not usually above that of major.

6. A civilian may be appointed. The Article si authorizes the appointment of "a judge advocate," wit specifying whether or not he shall be a military person,[5] and he may legally be a civilian has been uniformly held.[6] In British service the Judge Advocate General and Deputy J Advocate General, who formerly officiated at the principal t

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as judge advocate is that referred to in Joint Resolution, No. 2 March 3, 1855, where Congress makes an extra allowance to a pr soldier of a regiment of Tennessee Volunteers employed in the Sem war, "in full satisfaction for his services as judge advocate in the ment in said war."

1. DIGEST, 296.

2. The practice of employing medical officers as judge advocates from an early period in our service. See cases in G. O. 14 of 1832; 87 of 1822; Do. 62 of 1821.

3. DIGEST, 296.

4. A commissioned officer *without rank*, as a professor of the Mil Academy, would be legally eligible.

5. So Art. 90 simply indicates him as "some person."

6. DIGEST, 297; De Hart, 99, 316; Benét, 244; Coppée, 57.

y court-martial within the kingdom, are civilian lawyers.[1] Un-
ıer the present Rules of Procedure[2] the judge advocate of a
general court is required merely to be "a fit person," and while
he is in general an officer of the army, it is recognized that he
may be a civilian.[3]

In the American military service the judge advocates of courts-martial have from the beginning been, with few exceptions, officers of the army. The "division" judge advocates appointed under the Acts of 1812 and 1816 were civilians with major's pay, but these were superseded by military officers in 1818. In some of the earlier cases a "special judge advocate," who was a civilian lawyer, was designated to act in connection with the regular judge advocate; and in this capacity Hon. Martin Van Buren, (afterwards President of the United States,) was appointed for the trials of Brig. Gen. Hull in 1813 and Maj. Gen. Wilkinson in 1814. Between 1818 and the period of the late war,[4] as also during the continuance of the war,[5] the employment of civilians as judge advocates was of rare occurrence.

In our *naval* service, on the contrary, the judge advocates officiating at trials within the United States were, in general, up to a recent period, counsellors at law.[6] Since the passage, however, of the Act of June 22, 1870, by s. 17 of which, (now Sec. 189, Rev. Sts.,) was transferred to the Department of Justice the authority to employ counsel for the executive departments,

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1. 2 Clode, (M. F.) 362, 364; Hughes, 5; Gorham, 37; Jones, 63. The Judge Advocate General is a member of the existing Ministry and a Privy Councillor. See Manual, 198.

Outside of Great Britain the officiating judge advocates were usually military officers. Hughes, 180; Jones, 64. At trials under martial law, civilians were not unfrequently selected. As at Rev. J. Smith's trial in Demerara, in 1823. Simmons (§ 462, note,) states that—"On the trial of the Canadian rebels by martial law, in 1838 and 1839, three persons, one officer and two civilians, were 'jointly and severally' appointed to the duty of judge advocate."

2. See § 99. (A.)

3. Manual, 544.

4. By the Act of Feb. 18, 1832, c. 19, a special appropriation of thirty dollars is made for the services of a civilian named, as judge advocate at a certain trial "before a court-martial ordered by Gen. Wilkinson during the late war."

5. Two cases of distinguished civilians who acted as judge advocates in important trials in 1865, are mentioned in the DIGEST, p. 297, note.

6. At foreign stations an officer of the navy has generally been detailed. Harwood, 49.

neither the Secretary of the Navy nor the Secretary of War has been authorized to retain at the public expense a civilian lawyer to act as judge advocate of a court-martial.[1] Thus while the employment of a civilian in this capacity is as *legal* as ever, resort will rarely be had to one, and only in some important and difficult case requiring, for its efficient prosecution, special professional skill and experience. In such a case the Secretary of War, (or the Secretary of the Navy,) will properly call upon the Attorney General, as the head of the Department of Justice, to employ a lawyer to act either as judge advocate, or preferably as counsel to *assist* the regular military (or naval) judge advocate in the conduct of the trial.[2]

Limit of the Authority of Appointment. No person other than the official judge advocate can be detailed or can act as judge advocate. This—a point now beyond question, since the existing law clearly makes provision for but one judge advocate—was substantially held in 1814 in Maj. Gen. Wilkinson's case, in which, as already noticed, Martin Van Buren, then a civilian lawyer, was appointed to act as "special judge advocate" in addition to the "army judge advocate." The accused having objected in writing to his appearing in the case, it was ruled by the court that he could not legally do so, and he retired. This action is the more marked for the reason that he had acted in the same capacity on the trial of Brig. Gen. Hull in the preceding year, and without objection. In a case tried during the late war in which the proceedings were authenticated only by an officer designated as "assistant judge advocate," it was held by the reviewing authority that a sentence certified by such an officer could not be executed, and the proceedings were disapproved.[3] But the rule under consideration does not preclude the

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1 This was expressly held by the Attorney General, in construing the Act in this connection. XIII Opins., 514; XIV Id., 13.

2 The employment of counsel to assist in the prosecution of military cases was more frequently resorted to formerly than later or since the organization, in 1862, of a Judge Advocate General's Department in the Army. See De Hart, 318. In an early military case referred to in a Journal of Congress, 413, "two counsellors learned in the law" were appointed by Congress "to assist and co-operate with the judge advocate" at the trial. See, in this connection, a recent opinion of the Attorney, of March 21, 1885.

3 G. C. O. 20, Dept. of the N. West, 1863.

ailing of other officers to assist the judge advocate in an portant case,[1] or the employment of legal counsel for the same rpose, since such assistants are not thus invested with any of e legal functions of judge advocates.

Personal Qualifications for the Appointment—*1. Fitess.* As further apposite to the subject of the appointment of ie judge advocate, it may here be noted that, as it is expressed i the act of 1802, heretofore cited, the judge advocate should be "fit person."[2] This officer has been styled by McArthur[3] the *primum mobile;*" by Adye[4] "the mainspring of a courtartial." "If he errs," adds the latter writer, "all may go rong;" or, as it is quaintly expressed by Napier,[5] unless courtsartial have a properly instructed officer, "they must assemble i bodily fear." The question of fitness is of course a relative ie. While an officer may readily make himself familiar with ie routine of the prosecution of a brief and simple trial, a special aining and a considerable share of expert knowledge are reiired properly to qualify a military man to exercise with skill id completeness the function of judge advocate in a case of real fficulty and importance. To be prepared to meet all the issues at may be raised, and duly to perform all the other duties that ay be devolved upon him as judge advocate, in such a case, an ficer should be educated not only in the science of the military w,—including the statutory law, regulations, orders, and cusms, pertaining to the offences of military persons and their osecution, trial and punishment,—but also in the general crimial law and its practice and procedure, as well as in that most sential branch of legal learning, the general law of evidence.[6]

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1. On the trial, in 1865, of Payne, Herold and others, (as conspirators in the assassination of President Lincoln,) and upon that of Wirz n the same year, by military commission, the judge advocate was sisted in the former case by two officers, and in the latter by one, pecially detailed for the purpose.

2. The same term is used in the present British law. Rules of Proedure, 99. (A.)

3. Vol. 2, p. 279.

4. Page 113.

5. Page 114.

6. On the subject of the qualifications of a judge advocate, compare lughes, pp. 9–19, 178, *et seq.*

2. Absence of bias. As a judge advocate is not subject to challenge,[1] it is important that an officer strongly prejudiced for or against the accused, or who has a decided personal interest in the result of the trial, should not be selected as the judge advocate if it can be avoided. Thus, one interested in the conviction of an accused officer, for the reason that, in the event of a dismissal, he will become entitled to promotion, will not be a desirable person to be detailed as judge advocate for the trial, if any other suitable officer can be appointed without detriment to the service.[2] So it will be undesirable and in general indeed unseemly to detail as judge advocate a junior officer of the same staff corps as the accused, since such an officer can scarcely be exempt from partisanship in such a case. Where an officer appointed judge advocate is conscious of any such prepossession, bias, or interest as may materially affect the efficient or fair performance of his duty, he will properly communicate the fact, in a respectful manner, to the appointing authority, for his consideration.[3] But prejudice or interest, however conspicuous or controlling, on the part of the judge advocate cannot impair the *legal validity* of the proceedings.[4]

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1. See Chapter XIV.

2. In G. C. M. O. 5, War Dept., 1871, in connection with the action of the President upon the case of a Captain of the army, it was remarked as follows:—"In his review of this case, the Judge Advocate General calls attention to the fact that the Judge Advocate of the Court was not only a material witness for the prosecution, but, as senior first Lieutenant in the same regiment with accused, was the expectant of promotion to the next vacancy in the grade of Captain. In view of this fact, while there is no ground for doubting that the officer charged with this duty performed it with honest and pure intention, yet certainly his selection for it was unsuitable, inasmuch as by military law and usage it has always been held that the Judge Advocate should be free from personal bias or interest in the result of the proceedings in which he officiates."

3. In G. C. M. O. 41 of 1875, in a case of a soldier tried upon a charge of having made a false complaint that an officer had improperly assaulted him, which officer was judge advocate of the court and prosecuting witness, it was remarked as follows:—"It was not contemplated that a prisoner would be brought to trial before this Court on charges which raised the question whether its Judge Advocate had not himself been guilty of official misconduct. But such was the fact in this case. The Judge Advocate had a personal interest in the conviction of the prisoner, and was also the principal witness against him. Under such circumstances he should have applied to the proper authority to be relieved from duty as Judge Advocate. The proceedings are disapproved."

4. See DIGEST, 296.

II. HIS AUTHORITY AND DUTIES.

This subject will be considered under the heads of: The authority and duty of the judge advocate—(1,) Prior to the meeting of the court; (2,) Pending the proceedings and trial; and (3,) After the completion of the proceedings.

AUTHORITY AND DUTY OF THE JUDGE ADVOCATE PRIOR TO THE MEETING OF THE COURT.

As to Preparing or Perfecting the Charges. While in the ordinary criminal procedure the indictment is almost invariably framed by the prosecuting attorney,—in the *military* service, where any officer may prefer charges, the judge advocate of the court has a comparatively limited control over the form of the charges and specifications. He has no *original* authority, *virtute officii*, to entertain charges in the first instance, but can simply act upon such as are transmitted to him to prosecute. In the absence, therefore, of general instructions or specific authority for the purpose from the superior by whom he has been appointed, he cannot, as a general rule, make any material amendments in the pleadings as committed to him.[1] In some instances indeed, where the court was convened for the trial of enlisted men for light or simple offences, the papers have been transmitted and witnesses referred to the judge advocate, with instructions to frame, serve, and prosecute formal charges in the several cases, as the proofs may appear to warrant.[2] But in general, and especially in the more important class of cases, the charges will, regularly, have been prepared by the immediate commander of the accused or the original accuser, and revised by the Commander who is to convene the court, or the officer of the Judge Advocate General's Department or Acting Judge Advocate on his staff, or by the Judge Advocate General, before

1. DIGEST, 298; O'Brien, 235; G. C. M. O. 42, Dept. of the Platte, 1877; Do. 7, Dept. of Texas, 1882; Do. 9, Dept. of Arizona, 1884.

2. This was sometimes done during the late war, but, as a practice, belongs rather to the past, and to the period before department, &c., commands were furnished with staff judge advocates. In some of the old Orders the judge advocate was specifically directed to prepare the charges after conference with the original accuser, who had not duly formulated the same. See instances in G. O. of Aug. 10, 1819, and Sept. 7, 1820.

they reach the judge advocate of the court. In such cases, while the judge advocate may correct obvious errors of form and mistakes in names, dates, amounts, &c., known to him, from having communicated with the witnesses or otherwise, to be incorrect,[1] he cannot properly venture upon material amendments of substance, and certainly cannot assume of his own authority to reject any charge or specification, or to add a new one.[2] Where indeed the judge advocate of the court is an officer in whom a special confidence is reposed, as where he is the Judge Advocate or Acting Judge Advocate of the Department, &c., he may assume a larger discretion in the matter of amending the charges before trial, especially where he has already had to do with their preparation or revision. But in general, in the absence of some special authority or direction from the convening commander, the charges should remain substantially intact in the hands of the judge advocate, who should consider himself simply as a subordinate under orders to perform a particular duty, *viz.* to prosecute the particular charges committed to him by his superior. Where, from the testimony as personally examined by him, he is of opinion that a charge should be laid under a different Article from that selected, or that an additional charge or specification should be preferred, or other material change in the pleadings should be made, it will be proper for him to communicate the facts and his views to the Commander by whom he has been detailed, and await his instructions.[3]

As to Serving the Charges, &c. The subject of the service of charges has already been considered in treating of the Charge

1. See G. O. 25, 36, Dept. of the Mo., 1867; Do. 11, Dept. of the Gulf, 1865; Do. 64, Dept. of Ark., 1865; Do. 17, Dept. of Fla., 1866; Do. 26, 29, Dept. of La., 1868; Do. 35, Fifth Mil. Dist., 1868. A larger authority, however, is attributed to the judge advocate in some of these Orders than would be quite warranted in time of peace.

2. DIGEST, 298; G. O. 3, Div. Atlantic, 1876. That he cannot do this even with the concurrence of the court is remarked in G. C. M. O. 36, Dept. of the Platte, 1877.

3. "It is a part of the duty of an officiating judge advocate to represent to the officer convening the court any error or omission in the charge and thereby to anticipate or obviate any delay in the assembly of the court." Simmons § 414. And see De Hart, 313; G. O. 30, Dept. of the Mo., 1867. It is a part of his duty not to go to trial upon a defective indictment, (G. O. 11, Dept. of the Gulf, 1865; Do. 29, Dept. of La., 1868,) if the defect can be duly corrected.

The service of the charges is a duty usually devolving upon the judge advocate, and should be performed as soon as practicable after the charges have been perfected, or within a reasonable time before the trial. A list of the witnesses for the prosecution will properly accompany the charges. The accused will also properly be supplied with a copy of the Order detailing the court, so that he may have a reasonable opportunity to consider whether he will interpose challenges to any of the members. Where the Order does not specify the time or place of the particular trial, the judge advocate should notify the accused of the same. He should also promptly furnish him with copies of amended or "additional" charges or specifications, if any such are introduced.

As to Summoning, &c., the Witnesses. It is directed by par. 889 of the Army Regulations that the judge advocate "summon the necessary witnesses for the trial;" and, in order that the trial may not be delayed, it is in general his duty at this stage of the proceedings to summon the material witnesses, both those required for the prosecution[1] and those whose names are furnished him by the accused.[2] Where any witnesses are so distant, or otherwise situated or occupied, that their personal attendance cannot probably be procured without extraordinary expense, or embarrassment to the service, he will properly submit to the convening authority the question whether they shall be summoned to appear in person or required to give their depositions. If directed to procure their depositions, he will proceed to do so by preparing in concert with the accused the necessary interrogatories and forwarding the same through the proper channels, subject to the provisions of the 91st Article of War.[3] Where not satisfied as to the materiality of a proposed

1. That it is, in general, the duty of the judge advocate, though it ay not always be necessary, to summon, (and call to testify on the trial,) e witnesses *whose names have been appended to the charges*—see G. C. .O. 135, Dept. of Dakota, 1882; Do. 45, Id., 1884.

2. No persons, (except perhaps foreign ministers—see Wilkes' Trial, 79,) can be said to be legally exempt from being summoned as witsses on military trials. High public officials, however, will not propy be summoned where their attendance can be dispensed with without ious prejudice to the administration of justice.

3. As to the law in regard to depositions in military cases, and their m, see Chapter XVIII, and Appendix.

The time and expense of summoning a particular witness or witnesses

witness, or where the testimony of such a witness will be merely cumulative, he may omit or decline to summon him till requested or instructed to do so by the court or the commander.[1] Where the accused desires the attendance of a witness whom the judge advocate does not think it worth while to summon, he may well offer to *admit* in writing at the trial that the person, if present, would testify thus and so. A form of subpœna for witnesses, to be issued by the judge advocate, is given in the Appendix.

Service of summons. If the witness is at or near the place of trial, or station of the judge advocate, he may be personally summoned by the latter, or by any other officer or individual for him.[2] If he is at a greater distance, a subpœna, or application for his attendance, should generally be forwarded by the judge advocate "through the regular military channels,"[3] to the proper headquarters, in order that the proper orders may be made for his attendance, transportation, &c. The judge advocate should always cause a *civilian* witness to be *personally* served: this to facilitate the compelling of his attendance by attachment under Sec. 1202, Rev. Sts., if found necessary. A personal service will be made either by exhibiting to the witness the original subpœna and causing or enabling him to become informed of its contents, or—and preferably—by delivering to him a copy. The individual making the personal service will properly be instructed by the judge advocate to certify the fact, date and place of service on the back of the original[5] and thereupon return the same to him. Witnesses, on arriving at the place of trial, should report forthwith to the judge advocate.

Certificates of attendance—Witness fees. It may be noted here that it is part of the duty of the judge advocate to

may sometimes be saved by the judge advocate and accused entering into a written *stipulation* that certain specified facts shall be considered as admitted in the case. See example in Lieut. Devlin's Case. Printed Trial, p. 12.

1. See par. 880, A. R.

2. In order to avoid possible expense, a military person should, if practicable, be employed to make the service. G. O. 34, Dept. of the Platte, 1870.

3. See par. 802, A. R.

4. 1 Greenl. Ev. § 315, note.

5. See form in Appendix.

ve certificates of attendance to the civilian witnesses, including ch as may have attended to testify by deposition, in order that ey may receive their legal allowances for attendance and travel.[1] he law does not authorize the payment of witness fees *in ad-nce* in military cases.

As to Preparing the Case for Trial. The further duty is evolved upon the judge advocate of assuring himself, before oing to trial, that the proper evidence is available, and is suffi-ent to establish the charge.[2] In several instances, judge advo-ites have been severely censured in General Orders for proceed-g with the prosecution without duly preparing their cases, or forming themselves whether the witnesses proposed to be lled could establish the facts alleged in the specifications.[3] If, ter personally examining the witnesses, &c., a judge advocate ncludes that he cannot make out a *prima facie* case upon the arges referred to him for prosecution, he should, if there is ne, communicate the fact to the convening authority and ask structions.

A judge advocate entrusted with the conduct of an important osecution will also, before the trial, look carefully into such ints of law—especially questions in the law of evidence—as e likely to arise in the case, and prepare himself by study for esenting or contesting the same.

As to other Particulars. It devolves upon the judge ad-cate to make a requisition upon the quartermaster for the oper stationery for his own use and that of the court at the trial

1. See par. 1433, Army Regs. The allowances of witnesses are fixed pars. 1427, 1428 and 1435, Id., as amended by G. O. 4, 136, of 1882, d Do. 25, 26, of 1884.

2. See the remarks of the reviewing officers in G. O. 63, Dept. of the st, 1864 ; Do. 36, Dept. of the Mo., 1867. Tytler, (p. 358,) writes :— The judge advocate must instruct himself in all the circumstances of e case, and by what evidence the whole particulars are to be proved ainst the prisoner. Of these it is proper that he should prepare in iting a short analysis or plan for his own regulation in the conduct of e trial and examination of the witnesses." This last suggestion is eated by subsequent writers.

3. See G. O. 23 of 1824, where the President censures a judge advo-e for not producing the proper witnesses, who were apparently readily ilable, to prove the charge; also G. O. 71, Dept. of Ark., 1865, and lers above cited in which the preferring of charges without proper estigation is reflected upon.

or trials to be had, as also for a room or rooms, or other quarters in which to assemble, (with the necessary furniture, fuel, &c.,) if such have not already been provided. At most established posts, such a room is set apart. He will also properly apply to the assistant adjutant general, post adjutant, &c., for an *orderly* or *orderlies*, as may be required. If he does not exercise his statutory authority of appointing a *reporter*,[1] (or, in a case of unusual importance, though a reporter be actually appointed,) he may employ, with the concurrence of the court, a civilian *clerk*, or may apply to the proper official for an enlisted man to be ordered to report to him for duty as clerk. If an *interpreter* is necessary, he will take measures to obtain one—generally by summoning as a witness a person competent for the purpose.[2]

Where the charges or specifications are unusually numerous or extended, the judge advocate may well have the same *printed*, if practicable, for the convenience of the court upon its assembling and for reference during the trial, as also to facilitate the making up of the record.

Authority and Duty of the Judge Advocate Pending the Proceedings and Trial.

This Capacity in General. "The presence and assistance of an officiating judge advocate," observes Simmons,[3] "is essential to the jurisdiction of a court-martial." O'Brien[4] writes: "A court-martial cannot proceed to any business without this officer." Neither is strictly accurate. But while it is not necessary, (though certainly highly desirable and almost invariable,) that the judge advocate should be present at such preliminary action as a court may take after its first assembling and prior to the appearance of the accused, it is clear that the court cannot enter upon the *trial* without him, since, by Art. 84, he must first qualify them by administering "to each member" the prescribed oath. So, pending the trial, his presence, though it may not always be essential, cannot properly be dispensed with during any material proceeding.[5]

1. As to the exercise of this authority, see *post*.
2. As to clerks, interpreters, orderlies, &c., see Chapter XI.
3. § 462.
4. Page 229.
5. A judge advocate may indeed temporarily absent himself and

was observed by Kennedy,[1] (who has here been repeated by : writers,) that a judge advocate "appears at a court-martial ıree distinct characters," those of Prosecutor, Adviser to the rt, and Recorder; in the last of which only, the author adds, ıe subject to the direction or control of the court; being ıorized in the other two "to act according to his own judg- ıt and discretion."

/ith these principal capacities of the judge advocate are also e considered, as attaching at this stage to his office under law, his province as counsel or adviser of the accused, and authority and duty under Art. 85 and under Secs. 1202 and }, Rev. Sts.

s **Prosecutor**—***Legal status in general.*** From an / period in the British law till 1860, the judge advocate acted :osecutor in the name of the Sovereign before general courts- ıial.[2] But that he should sustain this character, while at the : time acting as official adviser to the court, was viewed by : of the authorities[3] as unjust to the accused and inexpedient, in 1860 it was expressly prescribed in one of the Articles of that he "should no longer be the prosecutor."[4] A provision e same effect is contained in the present Army Act.[5] "The : of prosecutor," says Clode,[6] "since the judge advocate has deposed from it, has not been assigned to any other official." ıe British practice, the acting prosecutor is now either the ıner's commanding officer, or an officer specially detailed for ɔurpose.[7]

our law the judge advocate has from the beginning acted as

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his place without affecting the validity of the proceedings; (Clode, ., 126; Benét, 86;) though this 'mars their unity,' (Coppée, 60,) where necessitated for any longer than a very brief period, should e a suspension of the proceedings, for the time, by the court. ST, 300–1.

Page 222. As to the change, later, in regard to the capacity of cutor in the British law, see *post.*

Tytler, 206, 349; Adye, 115, 119–120; Samuel, 619; Clode, M. 16.

Napier, 113; Warren, 10, 229, 232–3, 253.

See Simmons § 472; Clode, M. L., 125.

§ 50. (3.)

M. L. 126.

Simmons § 472; Queen's Regs., Sec. VI § 83.

the public prosecutor in military cases. In the articles of 1; it was enacted that the officer officiating as judge advocate sh "prosecute in the name of the United States of America," a provision to the same effect has been repeated in the cod the present time. No such agency as a "private prosecutor known to our law. In practice, the accuser or "prosecu witness" is often allowed to remain in court, to enable the ju advocate to confer with him during the trial, but the law d not recognize him as having any official part in the prosecu of the charges.

As sole prosecutor, the judge advocate, with us, practic conducts the trial—a function which in the British,[2] and m conspicuously in the French[3] law, is substantially devolved u the president. In the American law, the judge advocate arrai the prisoner; swears and examines the witnesses and cross-ex ines those of the defence; takes exceptions to pleas or testim offered on the part of the accused or to applications or prop tions made by or for him to the court which he deems inadm sible or objectionable; enters into such stipulations and ma such admissions in regard to testimony, &c., as he may de expedient;[4] and argues all exceptions taken and issues raise in the name and as the representative of the United States. like the prosecuting attorney in the ordinary criminal courts, presents, (or may present,) the closing argument on behalf of t Government.[5]

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1. No judge advocate was provided for in the original code of 1775.

2. See Simmons § 430; 2 Clode, M. F., 364, note.

3. See Alla, 216–221, 257–269. At the French *conseils de gue* the examination of the witnesses is in general conducted by the pr ident. In important cases, (as at Marshal Bazaine's trial,) the cou for the accused has been allowed, by courtesy, to add questions.

4. In a case in which the court instructed the judge advocate inform the accused that *it* admitted all he proposed to prove by a c tain witness, this action was disapproved as beyond the province of t court; the judge advocate, not the court, being the prosecutor. G. M. O. 59, Dept. of the Platte, 1872. So, as illustrating the gene subject, may be noticed here the remark of the reviewing authority G. C. M. O. 55, Dept. of the Mo., 1873, that 'the *court* had no autho to instruct the judge advocate whether a certain case should be pr ecuted or not, the prosecution being a duty devolving solely upon judge advocate for which he is answerable to the convening command

5. He may make an argument whether the accused does or not. C. M. O. 11 of 1872. Or he may decline argument; as did the ju advocate, (Judge Advocate General Holt,) on Gen. F. J. Porter's tr

Direction as to the course and conduct of the prosecution. As prosecutor, the judge advocate, representing as does the State, and acting under an authority identical h or equal to that of the court, should, as a general rule, regarded as independent of the court,[1] and therefore as powered, in the absence of special instructions on the sub- t from the convening officer, to conduct the prosecution such mode or upon such plan as may appear to himself st advantageous. Even in the British practice, as it is observed Simmons,[2] he "is usually permitted to adduce his evidence in order he may think fit." And in our service where he is de prosecutor by express statute, he should in general be med entitled to the same privilege which is uniformly accorded prosecuting attorneys in the criminal courts, of presenting h evidence in support of the charge as he may judge to be uisite or desirable and of presenting it in the form which he y consider most effective, of reserving such testimony for the uttal as he may regard not so pertinent to the direct examiion, and of preserving throughout the logical sequence denined upon by him, in preparing the case, as according with progressive stages of the history of the offence.[3]

ut while thus entitled in general to be left free in the presation of his proofs, it is of course incumbent upon the judge ocate, as prosecutor, "to lay before the court the full particu- "[4] of the offences charged. The court is sworn to "try and rmine" the matter before them, and it cannot do so unless ed in possession of all the facts. Thus the court may prop- intimate to an inexperienced or careless judge advocate that

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he expressed reason that the exigencies of the existing war did not fy his taking up the requisite time. Printed Trial, p. 218.

See Kennedy, 222; Hughes, 111.

§ 571.

In the leading naval case of Capt. Barron, (Printed Trial, 131–2,) the t made a general ruling as follows:—"The order in which the tesny on the part of the prosecution, either verbal or written, shall be ited before the court is a subject resting altogether in the discre- * * * of the judge advocate. The court will exercise no control it, but will hear everything which they ought to hear, and in any in which it may be thought proper to exhibit it." And see later to a similar effect in G. C. M. O. 97, Dept. of Dakota, 1878; Do. Dept. of Texas, 1878; and compare, as to the civil practice, 1 Burr's , 85, 469; Davany *v.* Coon, 45 Miss. 71.

Hughes, 118.

he has omitted to prove a material allegation in a specificatio or to evoke a material circumstance from a witness before th court, or to introduce a material witness whom it desires to hav called. On the other hand it may check an over-zealous judg advocate who is proving too much by needlessly putting i cumulative testimony or otherwise unreasonably protracting the investigation. This privilege, however, is one to be cautiously exercised.

Authority as to entry of nolle prosequi. It is clear that this authority, that is to say the authority to withdraw a particular charge or specification from the consideration of the court, cannot belong to the judge advocate as prosecutor, his duty as such being simply to prosecute the charges committed to him without addition or subtraction. Of his own motion, and in the absence of authority from the commander, (for the *court* cannot supply it,) he can no more withdraw a charge after arraignment than he can drop one before:[1] should he venture unauthorized to do so, he would be guilty of a military offence. If he is of opinion that a charge or specification should be *nol prossed*, and no authority for the purpose has been imparted in advance, he should apply for the same to headquarters, the court, (if concurring,) meanwhile adjourning over if necessary.[2]

Duty as a minister of justice. It was remarked by the judge in a late case in the Central Criminal Court of London, that it is "a general principle of criminal procedure that counsel for the prosecution should consider themselves not merely as advocates but as ministers of justice, and not as struggling for a verdict but as assistants in the ascertainment of truth according to law." Similarly, in a recent criminal case in Michigan,[4] the

1. "After charges have been properly referred to a court for trial, none save the convening authority, or the Secretary of War, can order a *nolle prosequi* to be entered." G. O. 98, Dept. of the Cumberland, 1863 (Gen. Thomas.) And see Do. 97, Dept. of No. Ca., 1865; Do. 8, Dept. of the South, 1874; G. C. M. O. 79, Dept. of the Platte, 1877; Do. 13, Id., 1878; Do. 45, 48, Div. Pacific and Dept. of Cal., 1880; DIGEST, 298, 345.

The subject of *Nolle Prosequi*, as an incident of the Procedure, considered in Chapter XV.

2. G. C. M. O. 14, Dept. of Cal., 1883.

3. Regina *v.* Berens, 4 F. & F., 842.

4. Wellar *v.* People, 30 Mich. 23.

rt observe:—"A public prosecutor is not a plaintiff's attor-
, but a sworn minister of justice, as much bound to protect
innocent as to pursue the guilty." So, O'Brien[1] says of the
ge advocate:—"He is to use no undue means to secure the
ıviction rather than the acquittal of the accused." In other
ırds, while he is not "to permit the interests of the public to
ffer,"[2] by failing to prosecute "with spirit and resolution,"[3]
is to remember that it is not incompatible but consonant with
s capacity as prosecutor to be so far impartial as not only not
obstruct but to facilitate the accused in making such defence
offering such matter of extenuation as may exist in the case.[4]
It is in view of this principle that it has been held by certain
urts, both in England and the United States,[5] that the prose-
ting officer, in presenting his case, is not at liberty to select
ose witnesses only whose testimony will conduce to a convic-
ın, leaving the accused to offer the rest, but that it is incum-
nt upon him to introduce all the witnesses present at the com-
ssion of the act charged or cognizant of the same, if attainable,
fore the accused is called upon for his defence. Thus it is
ld in one case:[6]—"All the facts constituting the *res gestæ*, so
as the prosecuting counsel is informed of and has the means
proving them, should, on principle and in fairness to the pris-
er, be laid before the jury by the prosecution." And in a later
e[7] it is remarked:—"The only legitimate object of the prose-
ion is to show the whole transaction as it was, whether its
dency is to establish guilt or innocence. The prosecuting
cer represents the public interest which can never be promoted
the conviction of the innocent. His object, like that of the
ırt, should be simply justice, and he has no right to sacrifice

. Page 284.
. De Hart, 323.
. Adye, 119.
. See De Hart, 323. "The danger in most cases is that, as prose-
or, he is inclined to be too severe upon the accused, to accept his
lt as a foregone conclusion, and rather to aim to prove it than
ply, as is his sole duty, to exhaust all the evidence *pro* and *con*, and
that determine the guilt or innocence of the accused." Coppée, 60.
. Regina *v.* Holden, 8 C. & P. 606; Regina *v.* Stroner, 1 C. & K.
; Maher *v.* People, 10 Mich. 225–6; Hurd *v.* People, 25 Mich. 416;
llar *v.* People, 30 Mich. 16.
Maher *v.* People, *ante*.
Hurd *v.* People, *ante*.

this to any pride of professional success." In the opinion of the author, this rule, though not followed by some other authorities who 'regard it as properly within the discretion of the prosecuting officer to produce such witnesses and such only as he thinks best,'[1] is believed especially to commend itself to adoption in the court-martial practice, and particularly in cases of enlisted men, and of officers undefended by competent counsel.[2]

The principle here presented will be further illustrated when we come to consider the subject of the relation of the judge advocate to the accused.

As Adviser to the Court, and in his Relation to the Same—*His duty in general.* As already noticed, one of the three principal functions assigned to the judge advocate of a court-martial is that of "adviser to the court in matters of form and law."[3] In this capacity a twofold duty is devolved upon this officer:

1. He is bound to *furnish his opinion* on any question of law, practice, or procedure, arising in the course of the trial, when the same is required of him by the court.[4] It is the right of the court to call upon him for such advice and assistance, but if the preparation of the opinion demands unusual labor, the court will properly adjourn to give him time to consult the authorities, &c. In general the opinion of a competent judge advocate, thus furnished, will be accepted as decisive by the court.[5] But even if wholly dissented from and in no respect followed, the judge advocate is entitled, for his own justification, and not by way of protest but as a part of the proceedings, to have such opinion incorporated in the written record: it should also be so recorded for the information of the reviewing authority.[6]

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1. See 1 Bishop, C. P. § [illegible].
2. See remarks of Lord Brougham in Parliament, as cited by Clode, [illegible]
3. Kennedy, [illegible]
4. See Tyler, [illegible] Simmons § 466; Kennedy, 224–5; Stoquelet, [illegible] Hughes, [illegible] Hickman, [illegible]; XIV Law Mag., 13; Malthy, [illegible] De Hart, 325; Benét, 201; Coppée, 57.
5. See Simmons § [illegible] Kennedy, 228; Hughes, 127. Note the [illegible] advice and opinion of the judge [illegible] Rules of Procedure, § 101 (F,) [illegible] that—"at a court-mar[illegible]
6. [illegible] Kennedy, 226–7; XIV Law

While it will be irregular for the judge advocate, except n his opinion is thus asked, to interpose his views in regard ny question which it is within the province and discretion of court to determine, yet if the action proposed by it to be en upon such a question will clearly transcend some statute, ulation, order or usage, or an established principle of law, it l then be his *duty to point out the fact.* In other words, where : error of the court is simply one of judgment, the judge advo- e, though, in his opinion, such error may work injustice in the e, should remain silent: otherwise where the action, if taken, ll manifestly contravene an article of war or other law of the vice, or legal principle properly governing the procedure of urts-martial,—here he is authorized, and it is indeed his duty, pectfully to *caution* the court against the apprehended ille- ity.[1]

When the court is closed for deliberation. What has t been said has particular reference to proceedings upon the al in open court. It is applicable, however, (except as to the ording of opinions,) to the stage of the session succeeding the aring of the court for deliberation upon its judgment. Here eed, his function being ministerial, the judge advocate should, the authorities concur in holding, especially refrain from vol- arily expressing or intimating any opinion, or attempting to uence any vote, upon the question of guilt or that of punish- nt. He will thus in general confine himself to the collecting the votes and the recording of the conclusions of the court, aining otherwise quite silent. But here also the court may uire his views upon any proposed action; and here too if any gality or material irregularity is committed,—as if a finding ade which is not apposite to the charge, or does not express real intent of the court, or is defective in its form; or a sen-

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., 14; Hughes, 123–128; Maltby, 122; O'Brien, 283; De Hart, -6. *Contra*, Simmons § 496 and note. In G. O. 5 of 1857, the etary of War remarks :—"The court refused to admit on their rd an argument of the judge advocate, objecting to an application he defence for delay. It was the duty of the judge advocate to e the objection, and the argument by which he sustained it was very er. It was a part of the proceedings which ought to have been red on the record." And see G. O. 17, Dept. of Florida, 1866; 50, Dept. of La., 1869.

See Benét, 201; O'Brien, 283; De Hart, 325.

tence is voted which is ambiguous in its terms, or is not authorized by the article of war upon which the charge is based, or imposes a punishment not sanctioned by military usage,—it will be no more than his duty to suggest the error, in order that the same may be corrected before the record is completed.[1] But inasmuch as the accused is not entitled to be present or to be heard at this stage of the proceedings, the judge advocate, in what he has here to say, will of course guard against making any statement or giving any advice that may tend to prejudice the rights of the accused.[2]

That the judge advocate indeed is permitted, or rather required by usage, to remain with the court during its deliberation while the accused is excluded,[3] is the feature of the proceedings of a military trial which is most open to criticism.[4] Its unfairness exists more in appearance than in fact. But it is a feature the strict justice of which is certainly subject to question, and in view of such question the judge advocate, when alone with the court, should be all the more scrupulous to divest himself not only of the office but of the *animus* of prosecutor.

As to preserving the votes of the members. The point was at one time considerably discussed, whether the judge advocate should preserve the written votes of the members given upon the findings or sentence. The only reason for preserving them would seem to be that, in their absence, the judge advocate, (or a member,) would not be enabled or would be less able

1. See, generally, upon this subject Simmons § 612, 636; Kennedy, 229, 230; Stocqueler, 113; Hickman, 137; Bombay, R., 31; Macomb, 58; De Hart, 327–8; O'Brien, 283, 284; Benét, 201–2; Coppée, 60.

2. See O'Brien, 284.

3. The leading case in which this principle was asserted was that of Capt. Amos Binney, reported in "The Militia Reporter," p. 180, (1810.) Here, upon the court clearing to consider an objection to evidence, the accused claimed that he had a right to remain and be heard equally with the judge advocate. The court ruled that he must retire in accordance with the established practice, and because, if they allowed him to remain, they might violate their oaths in regard to the disclosure of the votes and opinions of members. They also ruled that they could not exclude the judge advocate for the reason that it was the custom that such officer should be present at deliberations, and that the Article which required him to be sworn not to divulge any vote or opinion, & evidently contemplated that he should be present.

4. See Warren, 229, 232, 233, 254; also Report of Judiciary Committee of Senate, No. 1337, of Feb. 18, 1885.

testify as to the same if called upon to do so by a "court of stice"—the contingency indicated in Arts. 84 and 85.[1] But ıese Articles do not *require* that he should hold himself preıred to give such evidence. Moreover the written votes are no art of the official record or papers, but mere personal memoıda. Further if they are preserved, they may endanger the iscovery, by unauthorized persons, of the votes or opinions 'hich the judge advocate and members also have sworn not to ıake public.[2] The question involved is really one which conerns less the judge advocate than the members, since the latter ıay, under certain circumstances, become amenable to a civil ıit for damages for their action upon the court. The best sense n the subject would thus seem to be that the judge advocate ıould consult the wishes of the court as to the preserving by im of the paper votes, and keep or destroy them as the court ıay prefer. To destroy them is believed to be now the almost ıiform practice in our service.[3]

The personal relations of court and judge advocate. ı this connection the personal relation proper and desirable to : maintained between the judge advocate and the court may ell be touched upon. It is clear, as indicated by De Hart,[4] ıat such acts on the part of the judge advocate as the expressing : opinions where the same are not requested or warranted, the ıising of points as to unimportant matters, and the interposing : petty objections to testimony, can only bore and worry an semblage of military men, and incline them to override the ıdge advocate in the positions taken by him.

On the other hand, within his separate province, the judge lvocate is entitled to be recognized by the court as occupying position as independent as its own, and, wherever a proper and

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1. 1 McArthur, 323; Tytler, (edit. of 1800,) 371.

2. See Simmons § 614; Kennedy, 237; Tytler, xiii (Opinion of A. Gen., Sir Chas. Morgan;) Stocqueler, 114; Griffiths, 176; Benét, 7.

3. See this subject also considered in Chapter XIX on the Finding. A further office sometimes performed by the judge advocate, though t deemed to be strictly within his duties, may be noted here—that of ifying members of the day for reassembling where the court has ourned subject to the call of the president. See Circ., No. 4, of 5.

4. Page 328. And see Coppée, 60.

adequate occasion presents itself, is authorized not only fully express but to accentuate his views, even at the risk of offending some member or members who may entertain opposite opinions. But where the judge advocate is a person uniting tact with skill he will rarely find it necessary to assert himself as against the court. The latter perceiving him to be master of his case, and not dogmatic but simple and dignified in his manner of presenting it, will come to respect his opinions, and to consult and follow him as a legal adviser. Thus a mutual deference and confidence will arise, which will not only do away with much of the irritation incident to the collisions of an extended trial, but will result in a harmonious and effective dispatch of business.

Amenability of judge advocate for misconduct before the court. It need hardly be added that while the judge advocate cannot of course be placed in arrest by the court or its president,[1] he may be made amenable, under the 62d or other appropriate article, for any marked disrespect or disorderly behaviour in its presence, upon a representation made by it of the facts, or formal charges preferred, to the proper superior. So for disturbing the proceedings as indicated in Art. 86, he may become punishable as for a contempt. The author, however, is not aware of any precedent in our service of a conviction by court martial of an officer for misconduct of this character in the capacity of a judge advocate.[2]

As Counsel or Adviser of, and in his Relation to the Accused—*Particulars already considered.* Under the head of the province of the judge advocate prior to the trial we have noted the duties, devolving upon him at that stage, of serving (and explaining where necessary) the charges, furnishing a copy of the convening order, giving notice of time and place of trial, summoning witnesses for the defence, &c. We have now to inquire how far the judge advocate is called upon to counsel or assist the accused pending the trial or in connection therewith, and, generally, as to his official relation to the accused.

Effect of Art. 90. This Article declares that the judge advocate, "*when the prisoner has made his plea, shall so far act*

1. Chapter XII. And see McNaghten, 170–1; DIGEST, 301.

2. But see British precedents referred to by Hough, (P.) 704; also case of Major Browne reported in James, 504.

:imself counsel for the prisoner as to object to any leading on to any of the witnesses, and to any question to the pris- the answer to which might tend to criminate himself." is a most imperfect and ineffective provision; objecting to g questions is but a single feature of the function of coun- and, as to questions "to the prisoner," these are unknown our practice.[2] This provision, (derived from the Articles of 5,) illustrates the fact that the entire Article is in the main lete and futile, and might well, as already indicated, be tted from the code.[3]

ture and extent of his function as counsel, &c. It ar that the judge advocate cannot act in a *personal* capacity unsel to the accused, since such a character would be incom- le with that of public prosecutor. Thus it is clearly only *official* relation that he can advise or assist the accused. ave already seen that a judge advocate is bound to consider lf not merely as a prosecutor but as a "minister of justice;" mmon law doctrine being that the prosecuting official in a nal proceeding was "the assistant of the court in the rance of justice."[3] This doctrine is applied to the military dure by Simmons,[4] in holding that it is "in consonance the custom of the service that the judge advocate should

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Except indeed in a case—of course not contemplated by this Ar- where, under the recent Act of March 16, 1878, the accused goes stand as a *witness* in his own behalf, when he is examined and d like any other witness.

The declaration that—"The judge advocate shall prosecute in the of the United States," is the only provision that is of any signifi- This part of the Article might well be incorporated with Art. e remaining portion being dropped from the code.

Regina *v.* Thursfield, 8 C. & P. 269. And see Regina *v.* Berens, F. 842. The origin of this doctrine is the maxim or rather fiction common law that on an indictment for treason or felony, as the er was not entitled to defend by counsel, the judge acted as his l. 4 Black. Com., 355; 1 Bishop, C. P. § 296; 2 McArthur, 41.

468. "In his duty toward the prisoner, indeed, he is not ob- to go farther than the court itself: the court sits for the purpose ng justice, and is bound to take care that the prisoner does not suf- m his ignorance, inexperience, or incapacity." Pipon & Col., 40. e XIV Law Mag., 13; Macomb, 81; Benét, 196. Lord Brougham, bate in Parliament, described the judge advocate as: "the assessor court—standing between the prisoner and the court." Clode, M. 5.

only interfere to the extent to which the court itself is bou interpose." In our practice, however, no strict rule has prescribed or observed on this subject; and how far the j advocate shall properly counsel and assist the accused is le depend in the first instance on whether he is furnished with petent personal counsel, and secondly on his own intellig and ability to defend himself. Where he is without cou and especially where he is an ignorant or inexperienced sol the judge advocate will properly render him, both in and o court,[1] such assistance as may be compatible with his pri duty of efficiently conducting the prosecution.[2] In additio aiding him before the trial in collecting his proofs and prep his defence if he has one,—(and he will especially guard ag even suggesting his pleading *guilty* if the case has any m whatever,[3])—he will properly assist him in presenting in form such challenges as he may desire to urge,[4] in offering

1. The distinction taken by Kennedy, (p. 235,) and repeated by of our writers, (O'Brien, 285; De Hart, 309; Benét, 196,) that a j advocate may more properly or fully assist an accused *out* of th court, has no place in our law and is not regarded in practice. At stage or stages the judge advocate will best or most properly advi assist the accused will depend upon the circumstances of each case.

The doctrine, as stated by Simmons, (§ 468, and see Pipon & 40,) may be noted here—that the accused has a "*right* to the *op* of the judge advocate, either in or out of court, on any given que of law arising out of the proceedings." This rule, (repeated by De p. 312,) is now declared in the Rules of Procedure, 101 (A.,) as lows:—"The prosecutor and the prisoner respectively are, at all t after the judge advocate is named to act on the court, entitled to opinion on any question of law relative to the charge or trial, whe he is in or out of court, subject when he is in court to the permissio the court." But this doctrine too has no place in our law, where judge advocate differs from the same official in the British proce in being the prosecutor and in not representing the Judge Advo General. With us he furnishes no opinions except when requeste do so by the court. The court indeed may ask his opinion at the stance of the accused. But official opinions *out of court* are unknow our practice.

2. See Tytler, 355; Stocqueler, 113; Macomb, 80; Coppée, 20; G 45, Third Mil. Dist., 1868; Queen's Regulations, Sec. VI § 84. judge advocate should not, "in his zeal as prosecutor," be induce "overlook the interests of the prisoner." G. C. M. O. 3, Dep Arizona, 1883. (Gen Crook.)

3. "For the judge advocate to counsel the accused, when a s or inferior in rank, to plead guilty, must in general be unbefittin inadvisable." DIGEST, 299. And see G. O. 45, Third Mil. Dist., 1

4. See G. C. M. O. 19, Dept. of the Columbia, 1882.

lea or pleas general or special, and in bringing out the full testimony for the defence on the trial[1] as well as such circumstances of extenuation as may exist in the case.[2] It is in omitting to bring out in evidence existing matters of defence or extenuation, that judge advocates are most liable to fail in furthering complete justice in military cases. Though the defences and excuses set up by enlisted men in their statements to the court, especially in connection with pleas of guilty, are not unfrequently fabrications, they are by no means always so; and where there is no sufficient reason to doubt the good faith of the accused, the representations made in his statement, if not already sufficiently tested by evidence in the trial, may and in justice should be investigated, so far as the circumstances and exigencies of the service will reasonably permit. That it is incumbent on the judge advocate, (as well as on the court,) where the statement of the accused is inconsistent with his plea of guilty, and, in asserting facts constituting a substantial defence, indicates that the plea has been ignorantly made, to assist him to establish such facts in evidence before the case is finally closed,—has been repeatedly urged by the Judge Advocate General,[3] and by reviewing officers in General Orders.[4]

The relation of the judge advocate to the accused makes it further proper that, where the latter is unskilled or ignorant, the former should assist him in the preparation of his concluding

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1. In G. O. 42, Dept. of the Platte, 1871, it was remarked that the judge advocate, where the accused was without counsel, might properly take exception in behalf of the latter to a legally objectionable question put to a witness by a member of the court.

2. DIGEST, 299; G. O. 45, Third Mil. Dist., 1868.

3. DIGEST, 375–378. A view similar to that expressed in the text is contained in the Bombay R., p. 53.

4. See the following G. O. or G. C. M. O., in which the views on this subject of the Judge Advocate General are concurred in, or similar views are advanced, by military commanders: G. C. M. O. 2 of 1872; Do. 31 of 1876; Do. 34, Northern Dept., 1865; Do. 46, Dept. of the South, 1868; Do. 7, Id., 1869; Do. 28, Dept. of the Platte, 1869; Do. 39, Id., 1870; Do. 24, 68, Id., 1871; G. O. 31, Dept. of Cal., 1872; Do. 55, Id., 1874; Do. 98, Dept. of the East, 1872; Do. 14, 43, 68, Id., 1873; Do. 81, 83, 98, Dept. of Dakota, 1873; Do. 8, Id., 1876; Do. 19, 33, 38, Dept. of Texas, 1873; Do. 11, 16, 18, Id., 1874; Do. 45, Id., 1875; Do. 5, 74, Dept. of the Mo., 1875; Do. 61, Id., 1876; Do. 19, Div. Atlantic, 1874; Do. 23, Id., 1875; Circ. Dept. of the Gulf, Oct. 12, 1863.

statement or address, reading it also for him to the court if desired.[1]

It is to be added, however, in this connection that where the accused is provided with capable counsel, or, being an officer or person of unusual intelligence, is fully competent to conduct his own defence, the relation of the judge advocate toward him is so far modified that the former may be required, in the interests of justice, to assume a controversial if not an aggressive attitude. It will then indeed be his duty to resist the introduction by the accused of objectionable testimony, to contest any inadmissible special pleas or unreasonable motions made by him, and generally, while courteous in his treatment of him and strictly fair and considerate of his rights, to maintain with the zeal and energy of a champion the cause of the United States.

As Recorder—*In general.* The duty of the judge advocate as recorder or registrar of the proceedings is not, in our law as is that of prosecutor, attached to his office by statute, but by long established custom. This, while one of the principal functions of the judge advocate, is one in the exercise of which he is less independent than in any other, being here subject in the main to the direction and control of the court. That it is the court which really makes the record, the judge advocate being little more than its agent in the matter, is recognized in the Army Regulations, which, in par. 914, provide that—"every court-martial shall keep a complete and accurate record of its proceedings."

The Record thus being a history not properly of a prosecution by the judge advocate but of an investigation and judgment by the court, will be more suitably considered hereafter in a separate Chapter.

Authority and Duty under Art. 85—*Disclosure of "vote or opinion."* This Article provides that there shall be administered by the president of the court to the judge advocate before the trial is entered upon, an oath that he "*will not disclose or discover the vote or opinion of any particular member of the*

1. See Benét, 117. That a judge advocate cannot, independently of the court, assume, on account of its objectionable character, to reject a "statement" proposed to be offered by the accused, and require him to substitute another, was properly held in G. O. 31, Div. Atlantic, 187[illegible]

rt-martial, unless required to give evidence thereof, as a wit-s, by a court of justice, in due course of law; nor divulge the tence of the court to any but the proper authority, until it shall duly disclosed by the same." This provision amounts, in the st place, to a prohibition of the disclosure, either directly or lirectly, by the judge advocate, in making up the record or nerwise, of the vote or opinion of any member, not only upon e finding but also upon any *interlocutory question* determined the court. And a disclosure of the combined vote of *all* the embers is a breach of the oath: thus a statement in the record at a vote or finding was "unanimous" has properly been held constitute a violation of the prohibition of this Article, (as well of the 84th,) since it is a disclosure of the opinion of each dividual member.[1]

In regard to a corresponding article in the then British code, e view was expressed by Hough[2] that the judge advocate, ough forbidden to disclose votes and opinions of members, was not precluded by the Article to state any circumstances within s knowledge which may not be recorded on the proceedings, nich the commander-in-chief should be confidentially informed " so long, he adds, as the same did not extend to the dis-very of the views of any particular member but concerned only "general opinion." And Macomb,[3] upon this subject, ites:—"It is not inconsistent with his oath or duty for the lge advocate to communicate to the proper authority his views the proceedings of the court." The occasions, however, will rtainly be rare when the judge advocate will be justified in iking a communication of such a character.

Divulging of the sentence. There is nothing in the form oath prescribed by our Article[4] to preclude the judge advocate om making known the sentence to the reviewing officer prior the forwarding to him of the completed record. In practice, wever, this is not often done, the custom of forwarding the

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1. See DIGEST, 68.
2. Page 373, note.
3. Page 34. And see O'Brien, 259.
4. This part of the oath in the British law is:—"You do swear that I will not, *unless it is necessary for the due discharge of your official ies*, divulge the sentence of this court until it is duly confirmed." es of Procedure § 27. (A.)

proceedings immediately upon the termination of the trial doing away in general with any occasion for communicating the sentence before it would regularly become known from the record itself.

Unless the word "sentence" in the Article is construed as meaning *judgment*,—and no sufficient authority is perceived for such a construction,—it would not, strictly, constitute a violation of the oath for the judge advocate to disclose the fact of an *acquittal* by the court. But such a disclosure, made to the accused or any person other than the reviewing authority, would be so clearly contrary to the *spirit* of the Article and to the usage of the service, and so manifestly a breach of official confidence on the part of the judge advocate, as properly to render him amenable to a charge under Art. 62.[1]

Authority and Duty under Sec. 1202, Rev. Sts.—*Effect of the provision.* This statute, by which provision is made for the issuing of process of attachment of witnesses by judge advocates, is as follows:—"*Every judge advocate of a court-martial shall have power to issue the like process to compel witnesses to appear and testify which courts of criminal jurisdiction within the State, Territory, or District where such military courts shall be ordered to sit, may lawfully issue.*"

This statute, which would properly be included in the code as an article of war, was originally a provision of an Act of 1863 and in transferring the same to the Rev. Sts. the words "or court of inquiry" which followed the words "court-martial" were omitted. The authority conferred, therefore, while it may legally be exercised by judge advocates of inferior as well as of general courts, cannot be exercised by recorders of courts of inquiry.

The authority is in terms vested solely in the judge advocate and it is by him alone that the process can be initiated. No power is conferred upon the *court*, nor does the mandate, like the

1. In a recent Order—G. G. M. O. 11, Dept. of the Mo., 1882—Gen. Pope, in passing upon a case of a soldier acquitted by a general court-martial, remarks as follows:—"After the close of this case the court directed the judge advocate to communicate to the *post commander* the fact of the acquittal of the accused. To this the judge advocate took exception on the ground that he felt bound by the nature of his oath not to so divulge the finding of the court, and had therefore respectfully to refuse to obey its mandate. These facts appearing of record, the Department Commander rules that the court exceeded its authority in the premises."

it of a civil tribunal, issue in its name.[1] The judge advocate, wever, will sometimes properly *consult* the court as to the derableness of resorting to an attachment; especially where any onsiderable time may be required for the service and return of he same, and an unusual adjournment may thus be necessitated. He will also properly resort to it whenever the court, in its desire o secure the best or material evidence not otherwise procurable, alls upon him for the purpose.[2]

Nature of the authority. To authorize a resort to an attachment under this statute, there must have been a formal subpœna duly issued by the judge advocate and duly served upon the witness, and not complied with by him.[3] The authority to issue the compulsory process is coextensive with the authority to issue the subpœna, and with the jurisdiction of the court. The judge advocate of a court-martial convened at any place within the United States may issue an attachment to compel the attendance before it of a witness resident or being at any other place therein,[4] and whether he be a military person or civilian.[5] It was, however, for securing the attendance of civilian witnesses that the enactment was originally designed.

Service of the process. As to the mode of executing the process, it was held by the Attorney General[6] that, in view of the omission in the Act to indicate to whom the process should be directed or by whom it should be served, the judge advocate might legally direct it to some military officer who would thereupon be "charged with the duty of executing it." Upon this ruling was issued G. O. 93 of 1868, now incorporated in par. 93 of the Army Regulations, by which it is enjoined that the judge advocate issuing the process, shall "formally direct the

1. "The attachment is not a writ or process of the *court*, but simply compulsory instrumentality placed at the disposition of the judge advocate as the prosecuting official representing the United States." DIGEST, 489.

2. See G. C. M. O. 32, Dept. of the Columbia, 1882.

3. DIGEST, 489; G. O. 93 of 1868; 1 Greenl. Ev. § 315, 319. As to the proper mode of service, see *ante*.

4. See DIGEST, 490, and note.

5. XII Opins. At. Gen., 501.

6. XII Opins. 501.

Authority and Duty under Section 1203, Rev. Sts.— ***Exercise of the authority.*** This section, which might also rell have been inserted in the code as an article of war, and of rhich the original is a provision of the Act of March 3, 1863, c. '5, is expressed as follows:—"*The judge advocate of a military vurt shall have power to appoint a reporter, who shall record the broceedings of, and testimony taken before, such court, and may et down the same, in the first instance, in short hand. The reborter shall, before entering upon his duty, be sworn, or affirmed, faithfully to perform the same.*"

The power to appoint the reporter is perceived to be vested xclusively in the judge advocate; it thus cannot be exercised y the court, nor is it essential that the court should concur in n appointment.[1] Inasmuch, however, as the court is responible for the record which the reporter is to write, the judge dvocate will be careful to employ as reporter such a person only s will be acceptable and satisfactory to the court, and will proprly discontinue the employment where the appointee does not rove thus satisfactory.

The expense of a short-hand reporter should of course be ncurred only in an important case, and a General Order of 1880, ncorporated in par. 931 of the Army Regulations, declares that ne employment of such a reporter shall be authorized only "in ases where the authority convening the court may consider ich an officer necessary." As imposing a restriction upon a ower conferred by statute, the legality of such an order may e doubted; in itself, however, it is a proper and desirable regution, and should of course, (till rescinded or modified,) be strictly bserved by the judge advocate, especially as its observance may e a necessary condition to the receiving by the reporter of his ompensation.

Status, compensation, &c., of reporter. The judge adocate will properly supervise the performance of his duty by e reporter, giving him the needful instructions. By whom e reporter shall be sworn is not indicated in the law: in practce he is sworn by the judge advocate, who administers to m an oath following the wording of the statute.[2] Although it

1. DIGEST, 427.
2. See DIGEST, 427–8.

is prescribed in general terms in the Section that the "shall record the proceedings and testimony," it is c view of the provisions of Arts. 84 and 85, that he cann more than an ordinary clerk, properly be permitted to ı with the court after it is cleared for its final deliberation, f purpose of recording the findings and sentence.[1]

The statute, in authorizing the appointment of short reporters, contemplates of course that they shall be properly pensated, and a provision of a General Order of 1863, emb in par. 932 of the Army Regulations, fixes their compens at an amount "not to exceed ten dollars a day;" and amount is payable out of the annual appropriation for clerks of courts-martial. They are also allowed "transportati kind," if the place of meeting of the court is changed afte arrival; and it is directed that they "will be *paid* by th Department on the usual certificate of the judge advo This should be a certificate setting forth the precise term employment, that is to say, in the words of the regulatic number of days embraced in "the whole period of absenc their residence, traveling, or on duty."

Duty of the Judge Advocate after the Trial and pletion of the Proceedings.

Besides making out the proper certificates for witnesses, &c., the only duties devolving upon the judge advocate af proceedings of the court have been finally terminated and a ticated, are to complete the formal record, (annexing the its, &c.,) and forward the same to the proper reviewing aut The perfecting of the record will be referred to in the Cha the Record.

The Forwarding of the Record. This duty is en upon the judge advocate by the 113th Article of war, b Article is defective in requiring judge advocates of general to forward the proceedings in all cases direct to the Jud vocate General. In this general requirement the Article in harmony with the provisions of Arts. 104 and 109, re

1. Digest, 172, 428. But the fact that he was allowed to would not affect the *legal validity* of the finding or sentenc 68–9, 172.

e approval of the proceedings, &c., by the officer ordering the urt; and the existing practice does not accord with it except in ses of records of courts which have been ordered by the Presient. The practice, and proper procedure, are as indicated in ars. 918 and 919, Army Regulations, of which the latter repreents the substance of two General Orders, No. 72 of 1873 and 39 f 1877. The effect of these regulations and orders, and of the rovisions of the Articles of war, is, that it is for the judge advoate, upon the completion of the proceedings in any case, to forward the record, where the court was convened by the President, o the Judge Advocate General as the staff officer of the President roperly representing him for such purposes; and, where the ourt was convened by a military commander, to forward it dirctly to such commander, (or his successor in command,) as the uthority empowered to act upon—approve or disapprove, &c.— e proceedings and sentence. In the latter class of cases the cord will be transmitted to the general commanding the Army, e commander of a Division, Department, or separate army, the perintendent of the Military Academy, or, (in time of war,) the nmander of a division or separate brigade—as the case may

If the record is one of a regimental or garrison court, it will forwarded by the judge advocate to one of the commanders ignated in the 81st or 82d Article.[1]

A judge advocate is amenable to trial for neglect of duty in unsonably delaying to forward a record. The General Orders of Department of Virginia[2] contain a case of an officer convict- of the offence of neglecting, for thirteen days after their comtion, to forward certain records of a military commission of ich he was judge advocate, "thereby," as it is added in the cification, "unnecessarily prolonging the imprisonment of" accused "who had been acquitted by the said commission." a further case in the Department of the Lakes,[3] in which the ceedings were not transmitted by the judge advocate to detment headquarters till at the end of a month after the comtion of the trial, the reviewing authority, Gen. Robinson, rerks:—"No amount of extra duty required of any officer can use him for such delay as this while acting as judge advo-

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See DIGEST, 302 and note.

G. O. 36 of 1866.

G. O. 10 of 1867.

cate." And he adds that the judge advocate should pro forward the record not only because directed to do so l Army Regulations, but because "common justice to the pr requires that he should be speedily punished if guilty leased if innocent."

In another Order[1] the point has been noted that a judge cate should not defer sending forward a record till he can pany it with records of other cases tried by the same cou should in general transmit each record separately as so completed.[2]

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1. G. O. 10, Dept. of Texas, 1873.

2. The duty devolved upon Judge Advocates of Department by par. 875, Army Regs., of transmitting to the Judge Advoca eral monthly lists of the "cases tried and to be tried within thei diction;" and the authority, impliedly conferred upon judge ad by par. 1752, Army Regs., of administering oaths to persons de in regard to the loss, &c., of public property—are matters ne nected with the province of judge advocates as prosecuting office of courts-martial, and therefore are merely referred to without remark.

CHAPTER XIV.

CHALLENGES.

In a previous Chapter we left the Court ready to proceed to be ganized for the trial, subject to such objections, or challenges, ı might properly be taken to the members. To this stage we ɔw recur.

The Written Law on the Subject. The only statutory law lating to the matter of challenges is the 88th Article of war, of hich the original was the 71st Article of the code of 1806. The tisting Article is as follows:—"*Members of a court-martial may challenged by a prisoner, but only for cause stated to the court. he court shall determine the relevancy and validity thereof, and all not receive a challenge to more than one member at a time.*" The Army Regulations, par. 914, direct that the record of the ɔurt shall show that previously to the swearing of the court the cused was "asked whether he had any objection to any mem- r, and his answer thereto." The question here indicated as to addressed to the accused is, in practice, preceded by a reading the accused of the order or orders constituting the court and tailing the members by their names and official descriptions. In considering the subject of the present Chapter, we will mmence with a Construction of the provisions of the Article, us disposing of several questions of importance, and examin- g next the Procedure under it, will conclude with a review the Grounds of Challenge, as indicated and illustrated both the military authorities and the rulings of the civil courts.

I. THE ARTICLE CONSTRUED AND CONSIDERED.

'Members." This general term necessarily includes the sident and subjects him to challenge in precisely the same

manner and to the same extent as any other member. The "members" only being made liable to objection, it follows that the judge advocate, not being a member, is not challengeable under the Article.[1] Any objection which the accused may have to the judge advocate must be addressed to the convening authority.[2]

In the term "members" is of course embraced not only the members originally detailed, (including both those present when the court is first assembled and the opportunity of challenge is first exercised by or extended to the accused, and those, if any, who may arrive and take part on a subsequent day,) but also members who may be added to the court to replace those dropped upon challenge or relieved by order.[3] For, as to all members who come, under whatever circumstances, to act upon the court the accused has the same right, and should be offered the same opportunity, of objection under the Article. In several cases published in General Orders, the proceedings have been disapproved because it did not appear that the accused had been afforded the opportunity of challenge as to members joining, or added to, the court after its first organization or assembling.[4]

So, where a court-martial has been required to be dissolved, and a new court of some of the same members has been substituted, for the reason that by the operation of challenges or otherwise the first court was reduced below five members, the members of the second court are liable to challenge though they may have been so subject, and may even have been challenged in fact (unsuccessfully) on the original court.[5]

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1. Simmons § 465, 499; Kennedy, 52; Hough, (A.) 48; Napier, 88; Clode, M. L., 126; Franklyn, 24; Rules of Procedure, 25. (B.;) O'Brien, 240; De Hart, 116, 312; DIGEST, 73, 298; G. O. 28, Dept. of Arizona, 1876. The point was much contested in some of the earlier cases. In the leading case, for example, of Capt. Porter, U. S. N., in 1825, the liability of the judge advocate to challenge was elaborately urged by the accused in argument, but not recognized by the court.

2. Simmons § 465; Benét, 70; Capt. Loring's Trial, Militia Reporter, 2.

3. Simmons § 499; Hough, (A.) 50; Kennedy, 56; McNaghten, 174; Hughes, 42.

4. G. O. 68 of 1863; Do. 12, Dept. of the Gulf, 1865; Do. 2, Dept. of the Platte, 1868; Do. 5, Fourth Mil. Dist., 1868; G. C. M. O. 6, Dept. of the Miss., 1865.

5. See De Hart, 89–90.

"Of a Court-Martial." This term includes, with general, o regimental and garrison courts;[1] and the members of these ırts are accordingly challenged in our practice, though more ely than the members of general courts. The term does not brace a court of inquiry[2] nor a military commission; and no ıer provision exists in our code by which the challenging of mbers of either of these bodies is authorized: *in practice*, wever, the right of challenge is recognized before each.

'May be Challenged by a Prisoner." Here is authority the taking of exceptions to members *by the accused only*. It uniformly held, however, by the authorities that the same ht may, and in a proper case should, be exercised by the prosıtion;[3] and in practice judge advocates occasionally though t frequently do interpose challenges on the part of the United ıtes. Resting, as such action really does, on long-continued *ıge*, it is now too late to dispute its authority. Were the quesn a new one, it might well be argued that the statute, in specally extending the privilege to the "prisoner" only, was ›perly to be construed as excluding the prosecutor.

'Only for Cause Stated to the Court." This provision :ludes *peremptory* challenges,[4] *i. e.* challenges preferred with- t any reasons assigned therefor. Of these a certain number re, in capital cases, allowed to the prisoner, *in favorem vitæ*, the common law, and are now allowed to both parties in civil l criminal cases by the laws of most of the States and of the

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. Field officers' courts, however, are not subject to challenge under Article, because, being composed of but one member, there is no hority competent to pass upon the validity of the challenge. DIST, 70.

:. Simmons § 340; DIGEST, 97. In the Joint Resolution of Conss, of Feb. 13, 1874, authorizing the special Inquiry in the case of g. Gen. Howard, it was provided,—"that the accused may be aled the same right of challenge as allowed by law in trials by courtrtial." This exceptional provision would have been unnecessary if right had *legally* attached to courts of inquiry in general at military

. That the right is "mutual" or "reciprocal," *i. e.* possessed by judge advocate equally with the accused, see Adye, 167; Tytler, ; Hough, 944; Id., (P.) 664; McNaghten, 103; Hughes, 41; Mab, 31; Maltby, 28; O'Brien, 240; De Hart, 118; Benét, 70; Lee, G. O. 11, Dept. of Cal., 1865.

Maltby, 28; De Hart, 114, 118.

United States.[1] At military law, however, in England, the same were not formally sanctioned by usage,[2] and are now precluded by statute:[3] in the American code only challenges for legal cause have ever been permitted.[4]

A "cause stated" is, properly, not merely a general statement or assertion, as that the member is prejudiced, biased, &c. The facts and circumstances in which the alleged prejudice, &c., is deemed to consist should in each case be set forth, to fully meet the requirement of the Article. The objection should be specific or as much so as the challenger can reasonably make it.[5]

"The Court * * * shall not Receive a Challenge to More than One Member at a Time." That is to say, challenges to the *array*[6] shall not be entertained; or, as Simmons expresses it, "a prisoner cannot challenge the court generally," or "the whole of the members collectively."[7] The objections which go to the jurisdiction, constitution, composition, &c., of the court *as a body* cannot be entertained by a court martial *as challenges* under the present Article.[8] Nor, though the accused may deem all the members to be prejudiced or otherwise personally subject to exception, and though his grounds of objection may be the same to each member, he cannot include them all in a general challenge but is permitted to challenge them

1. See Sec. 819, Rev. Sts.

2. 2 Williamson, 85; 2 McArthur, 273, 275; Tytler, 221; Simmons § 500; Kennedy, 51; Griffiths, 47; Bombay, R., 11.

3. Army Act § 51.

4. As has been well said by Gen. Terry in a recent case,—"the allowance of a challenge is not a matter of discretion" but one to be determined "in accordance with established principles and rules of law." G. C. M. O. 134, Dept. of Dakota, 1884.

5. Digest, 72. And compare Mann v. Glover, 2 Green, (N. J.,) 20[illegible]

6. So called in reference to the whole body of jurors as "arrayed," or arranged on the panel.

7. § 400. And see Digest, 73; G. C. M. O. 8, Dept. of the Platte, 187[illegible] In Capt. Drane's case, 1847, the accused challenged the array on the ground that not one-half of the members were his superiors in rank: the objection was not sustained. In Com. Wilkes' case, in 1864, the accused challenged the array on the ground that the Secretary of the Navy, who, in accordance with a peculiar usage confined to the navy, had preferred the charges, had also selected the court. The court refused to entertain the challenge.

8. Compare Brooks v. Davis, 17 Pick. 150; Clark v. Van Vradt 20 Barb. 28[illegible]

ingly only.[1] He may indeed challenge all in succession if he see it,[2] but the court will only receive and pass upon a challenge to one member at a time, not entertaining a further objection till that previously offered has been determined.[3]

Where a party has several different grounds of objection to one member, the better practice is for the court to require that they be offered separately, in such order as the party may prefer.

II. PROCEDURE UNDER THE ARTICLE.

At what stage Challenges may be Offered. The regular and appropriate occasion for the interposing of challenges is when the accused, by the reading of the order or orders detailing the court, is informed as to the members present, and before the court is sworn.[4] It is then that the accused is formally asked by the judge advocate, in accordance with the army regulation hereofore cited, if he has "any objection to any member," and it is then that, (like the prisoner before a civil court at the corresponding point of its proceedings,) he must present such objections as he knows or believes to exist, if he desires to take advantage of the same. If at this time he fails to present such objections, he is held to have *waived* them, and cannot be allowed to interpose them at any subsequent stage.[5]

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1. See G. C. M. O. 8, Dept. of the Platte, 1873.

2. Simmons § 497, note; DIGEST, 73; G. O. 37, Dept. of Kans., 1864; Opins. At. Gen., 707.

3. Simmons § 497. In a case in G. O. 24, Dept. of the Platte, 1869, the proceedings were disapproved because of the action of the court in entertaining a challenge offered by the accused to two members at the same time, "in violation of the plain provisions" of the Article.

4. Hough, 943; Griffiths, 47; De Hart, 125. "The regular practice is to challenge jurors as they come to the book to be sworn." People *v.* Damon, 13 Wend. 352. "The proper time for challenging is between the appearance and swearing of the jurors." Williams *v.* State, 3 Kelly, 53.

5. Not replying or offering an objeetion when the question is put may be considered by the court as tantamount to his having *no* objection." D'Aguilar, 101. "If a cause of challenge known to the prisoner prior to his arraignment has been waived by him, it cannot subsequently be urged." De Hart, 125. And see DIGEST, 72. "The rule of the common law is that neither party has a right of challenge after the juror is sworn, for cause then existing." U. S. *v.* Morris, 1 Curtis, 35. "If a party knows of any prejudice entertained by a juror, and makes no exception when the jury is empanelled, however good his cause of challenge then is, it must be deemed to be waived." Fox *v.* Hazleton, 10 Pick. 277. And see recent Opin. of At. Gen., in case of Lieut. Armstrong, of June 28, 1882.

But valid objections may exist at this time, not known to the accused, (or to his counsel, if he has one,[1]) and of the existence of which he could not by reasonable diligence have been informed.[2] In such event, it is permitted to the accused, (as to the prisoner under similar circumstances at a criminal trial,[3]) to take his exception as soon as the facts justifying it are brought to his knowledge, although this may not be till some time after the court has been sworn and at a late stage of the trial.[4] Again, pending the trial, a member who has been duly sworn at the proper time, and has taken part in the proceedings, may, by some expression of opinion or other act, render himself, as may a juror under similar circumstances, subject to challenge, and he may thereupon be challenged accordingly, whatever be the stage of the proceedings.[5] In all such cases the military practice, in the

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1. The rule that—"the knowledge of the counsel is the knowledge of the party, and notice to him is notice to the party," (State *v.* Fuller, 34 Conn. 280,) while applicable to military cases, would not ordinarily be so strictly applied as in a civil case.

2. The furnishing to the accused before the trial of a copy of the order detailing the court has already, (see Chapter XIII,) been recommended as affording him an opportunity to prepare such challenges as he may propose to offer when the court assembles.

3. "It has always been held that if a juror prejudge the case, and it is unknown" at the outset, "it is ground for challenge subsequently." Sellers *v.* State, 3 Scam. 416. In this case, and others, new trials were granted because a juror, on being challenged and interrogated before he was sworn, had stated that he had not formed or expressed an opinion, whereas it subsequently appeared that he had in fact done so.

Where the party, "though knowing of the objection, forgot to raise it at the proper time," he is not entitled to raise it subsequently. Barlow *v.* State, 2 Blackf. 114. "If the party, before the juror is sworn, neglects to avail himself of means of information readily accessible by which he could inform himself of the objection, the law fixes him with knowledge, and will not allow him to take advantage of his laches." See Bailey *v.* Trumbull, 31 Conn. 581; Quinebaug Bk. *v.* Leavens, 4 Id. 8[illegible]; Fox *v.* Harleton, 10 Pick. 277; Gillespie *v.* State, 8 Yerg. 507.

4. See Tytler, 231; Hough, 243, note; Id., (A.) 49; McNaghten, 173; De Hart, 124.

5. "It has always been allowable to challenge a juror after he is sworn for a cause thereafter arising, for the reason that the act of the juror which constitutes the new ground of challenge places him in the same relation to the remaining portion of the trial as that in which a juror challengeable at the outset stands to the whole investigation; for the trial after the arising of the new ground can be no more impartial than can be the trial from the beginning with a juror biased or otherwise d[illegible]

nterest of justice, follows that of the civil courts, in allowing the challenge to be interposed.[1] The occasions, however, of challenges offered to members of courts-martial, after the court has been sworn, whether for causes previously existing but not known or for causes subsequently arising, are extremely rare.

Order of Challenges. In the British law, objections to members are raised in the order of their rank, beginning with the lowest in rank.[2] In our practice no such rule obtains; the accused, (or judge advocate,) being permitted to challenge members, where he objects to more than one, in such order as he may deem expedient.

Form of presenting Challenges. A party availing himself of the opportunity of challenge may state his objection verbally or in writing. In our practice, challenges are generally expressed orally: the court, however, in a proper case, as where the grounds of objection are exceptional in their nature, or vaguely declared, or are apparently frivolous or actuated by personal feeling, may require the challenge to be presented in writing. As observed by De Hart,[3] the challenge should "always be stated in becoming and respectful terms"—a rule particularly to be observed where personal prejudice or hostility is ascribed to the member. The court may properly decline to entertain a challenge clearly frivolous,[4] as well as one expressed in unnecessarily offensive language. But where the challenge merely states facts, which if proved will constitute a valid objection, the court cannot refuse to consider the same, however grave or injurious to the member may be the charge involved.

The court, according to the practice already noted, will require

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qualified in advance.' People *v.* Bodine, 1 Edmonds, 44. And see State *v.* Fuller, 34 Conn. 280; Mynatt *v.* Hubbs, 6 Heisk. 322, and cases cited.

1. Where an accused officer, having a valid objection to a member of the court, omitted to raise it at all at the trial, it was held that he must be deemed to have consented to the court as composed, and was stopped from raising the objection at a later period as ground for impeaching the validity of the sentence. Lieut. Keyes' Case,—in DIGEST, 3, XV Opins. At Gen., 432, and 15 Ct. Cl., 533; Opin. At. Gen., in Lieut. Armstrong's Case, of June 28, 1882.

2. Rules of Procedure § 25, (E. ;) Simmons § 497.

3. Page 116.

4. See De Hart, 118, 127; G. O. 13, Dept. of the Potomac, 1867.

the party, where he has several distinct grounds of objectio member, to present them *seriatim*, and will consider and upon the same separately, precisely as if they were challeng separate members. Under the pretext or form of a secon further objection, a party should not be permitted to reiterat substance, an objection already overruled.[1]

Response to the Challenge by the Member. The jection being presented, the member excepted to may or may respond to the same in his discretion.[2] If he does so, admitt that the objection as stated exists, and the same is a valid relevant one, the court will properly hold the challenge to sustained; indeed in such a case the member himself will of express a wish to be excused.[3] If, on the contrary, he does admit the facts alleged, he may, by a statement or explanati (which he is always at liberty to make,[4]) satisfy the challengi party that he is in error and induce him to withdraw his ch lenge. Thus it is not unusual for a member objected to prejudice against the accused, to disclaim having any such feeli or bias as imputed and to state that he is aware of no reason w he cannot judge impartially in the case. Upon such a declarati

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1. Compare Mann *v.* Glover, 2 Green, 195. As already indicat where a valid ground of challenge exists which the accused, thro ignorance, fails to present in a proper form, he should be so instru and assisted by the judge advocate or the court as to be enabled to the full benefit of the same. See G. C. M. O. 19, Dept. of the lumbia, 1882.

2. That the court cannot properly *require* him so to respond G. O. 2 of 1858.

The mere statement of an accused, not admitted by the memb not sufficient to support a challenge. See G. C. M. O. 35, Dep Dakota, 1884.

3. But see *post*, to the effect that the member cannot be excuse his own request but only upon a challenge regularly passed upon sustained.

4. The challenged member may admit and ask to withdraw, or plain. Hough, (P.) 709. "The usual practice is for the member rise and admit, or deny the truth of the objection, or to explain i O'Brien, 240. And see Simmons § 500; Bombay, R., 11; De Hart, 11 In the civil practice, opportunity is afforded to jurors, in justice themselves, to explain away any injurious imputations involved in challenges as offered. Thus in Taylor *v.* Greely, 3 Greenl. 204, the c say. The testimony of the juror himself is to be heard in expl [illegible] the language or conduct imputed to him. In McFadden *v.* Co [illegible] it is observed:—"A juror, like every other person publ assailed, ought to be heard in vindication of his character."

: in evident good faith, the accused will, in the majority of s, cease to press his objection.[1]

rial of the Challenge. But where the statement of the nber fails to satisfy the challenging party, and the objection ısisted upon; or where the member makes no response to the llenge; it is open to the party either to submit the question he validity of the challenge to the court simply upon his own :ement and that of the member, if any, or, (as is in general the per course where the member fails to make an admission or ıtate facts,) to proceed to try the challenge by the offer of dence,[2] like any other issue.[3]

This evidence may include not only the testimony of witnesses, well as such documentary or other written proof as may be evant,[4] but also the testimony of the member himself brought t upon an examination instituted by the challenging party.

That the challenging party is entitled, if he desires it, to subct the challenged member to an examination by interrogatories, ı the same manner as a juror may be subjected to examination ı the criminal practice,[5] is well settled.[6] Some of the authori-

1. DIGEST, 72; O'Brien, 240.

2. A court should not allow a challenge "upon its mere assertion by the accused without proof, and in the absence of any admission on the part of the member." DIGEST, 72. The admission of an objection unsupported by evidence and "without any reason shown beyond a mere supposition or prejudice of the prisoner, tends in effect to introduce into courts-martial the allowance of peremptory challenge—a practice wholly unknown to our military code." G. C. M. O. 66 of 1875.

3. That the proceeding upon a contested challenge is a trial upon an issue joined, see Clark *v.* Van Vracken, 20 Barb. 281.

4. See Simmons § 500; De Hart, 116. That any relevant and proper testimony is competent to show the true state of mind of a challenged juror where his statement or personal examination has failed to disclose bias on his part, see Bickam *v.* Pissant, Coxe, 220; State *v.* Benton, 2 Dev. & Bat. 212; People *v.* Reyes, 5 Cal. 347. "As to the *mode* of proving a challenge, the law of evidence is the same as in other cases. Proof may be made by records, papers, or witnesses, either to support the challenge or to disprove it." State *v.* Spencer, 1 Zabr. 199.

5. "In order to arrive at the condition of the person's mind who is offered as a juror, a party is permitted to ask of the person himself questions the answers to which may tend to show whether he is prejudiced or not in the cause which he is about to undertake to decide." People *v.* Reyes, 5 Cal. 349. And see Lohman *v.* People, 1 Comst. 1; Justices *v.* Plank R. Co., 15 Ga. 54; State *v.* Benton, 2 Dev. & : 222.

O'Brien, 240; G. O. 21 of 1853. In this Order and also in G. O.

ties indeed refer to this examination as properly had upon oath, like the examination upon the *voir dire* in the civil courts.[1] But our military law makes no provision for swearing the member under the circumstances; and, in the absence of such authority, it is clear that for the court, before it organizes, to assume to administer to him the oath of a witness, or any oath, would be a proceeding without warrant of law.[2] But, though not sworn as such, he is *examined* as a witness,[3] and the examination is therefore to be governed by the rules which specially govern the examination of a juror under similar circumstances, the principle of which is that questions shall not be asked the answers to which will tend to criminate the party, or will directly attach to him disgrace, as by the confession of dishonorable or disreputable acts.[4] The exemption, however, from answering such questions is held, in the case of a juror, to be a *personal privilege* which may be *waived*.[5]

As to the *other* witnesses who may be offered, these also cannot

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8. Div. Pacific, 1870, the proceedings of a trial were disapproved because the right of personal examination of the member was denied to the accused by the court.

1. See O'Brien, 239; Ives, 92; G. O. 35 of 1867.

2. "The court must decide on the *assertion* of the party challenging of the officer challenged, and of the witnesses examined; for it has no authority to receive evidence *on oath*, before the administration of the prescribed oath to the members." Simmons § 500. And see, to a similar effect, De Hart, 116; DIGEST, 72. At this stage indeed of the proceedings, no oath whatever can legally be administered either by the president or judge advocate.

3. "The juror becomes merely a witness, and he may be examined as a witness. He will be exempt from answering such questions as witnesses are exempt from answering, and from no others." Justices v. Plank R. Co., 15 Ga. 55.

4. O'Brien, 239; G. O. 21 of 1853. "A juror may be asked such questions as do not tend to his infamy or disgrace." 5 Bac. Abr., 3[illegible] "It cannot be asked a juror if he has been either charged with, imprisoned for, or convicted of, a crime." Jones *v.* State, 2 Blackf. 47[illegible] The exemption of a member of a court-martial from being required to give criminating testimony should be held to include testimony implicating him either in a military or a civil offence.

If the inquiries addressed to the member by the accused bring out unfavorable opinions of the accused himself, these, if given in good faith, are "official and privileged." G. O. 2 of 1858. It is added in this Order that if an answer "goes too far" in injurious reference to the accused, "the court should interpose."

5. Boon *v.* State, 1 Kelly, 622; Sprouse *v.* Com., 2 Va. Cas. 37[illegible]

sworn; no authority to swear witnesses at this stage being erred by the code or other statute.

is to be added that the other party, if he thinks proper to est the challenge, may take part in the examination by ing questions in the nature of cross-interrogatories to the ıber or witnesses. He may also introduce counter-witnesses her evidence relevant to the issue.[1] It is very rare, however, the trial of a military challenge is thus far extended.

ther party, or both parties, may make argument upon the ence.

ıallenge by the Judge Advocate. The challenges de- to be offered on the part of the prosecution, if any, are in ice interposed *after* the full exercise of his right by the sed,[2] and in a similar form and manner.

ıe Deliberation by the Court. The trial of the chal- , which is commonly conducted in open court, having been leted, the court is in general cleared for deliberation upon letermination of the matter of the objection,—a proceeding, y be remarked, for which it is not required to be, and is not actice, sworn.[3] Where indeed the ground of challenge, tted or shown to exist, is manifestly valid, (as in the case of llenge distinguished, as will hereafter be indicated, in the practice as a challenge "for principal cause,") the court not go through the form of clearing, but may well pass and allow the challenge at once as they sit.

on a clearing or deliberation, the challenged member usually properly withdraws from the court, that is to say does not in with it:[4] if however he stays, he takes no part in the dis- on or decision. His remaining cannot indeed affect the ity of the proceedings, but his withdrawal is desirable as oting freedom of discussion[5] and may properly be requested

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Compare State *v.* Spencer, 1 Zabr., 199, as cited in note *ante.*

Hough, 944, note; Id., (A.) 45; De Hart, 125.

See De Hart, 116.

Hough, (P.) 779; Id., (A.) 48; Simmons § 500; Kennedy, 51; r, 87; Griffiths, 47; Bombay R., 11; Hughes, 42; Macomb, 31; ırt, 115; Benét, 69; Coppée, 65; DIGEST, 72.

Simmons § 500, (edit. of 1863.) Attorney General Cushing, in re- ıg, (VII Opins., 284,) upon "the course to be pursued by an arbi- judge, or other member of a plural body," when for any legal cause

by the court. In an early leading case,[1] a member of a gen court-martial, for a refusal, *expressed in grossly disrespec terms*, to retire when so requested, was brought to trial and c victed upon a charge of "conduct to the prejudice of good or and military discipline." The member indeed cannot be c pelled to withdraw against his will, nor will the mere fact of omitting or declining to withdraw constitute a military offen but in general his sense of propriety and justice will induce h to retire of his own accord and as a matter of course.

That the court, including the challenged member, may con of but five persons, can constitute no reason why he should n withdraw. That four members of a general court are compete at this stage of the proceedings, to determine the matter o challenge offered to a fifth member, is well settled in our lav the member does not cease to be a member because of bei challenged. So, also, two members of a regimental or garris court may, and must, pass upon an exception taken to the r maining member. But where, of a general court consisting five members, four have duly allowed a challenge to the fif member who has accordingly retired from the court, the four r maining are not competent to entertain a further challenge; th is to say, three of the remaining four cannot legally pass upon challenge to the other member.[3]

In deliberating upon the subject of the challenge as offered, will be for the court to inquire, *first*, whether the ground of ol jection advanced is a valid one; *secondly*, whether its existenc in the particular case is established. What are valid ground of challenge at military law will be considered presently. As t the question of the sufficiency of the proof, the court will prop erly bear in mind two principles: 1st, that the burden of main

"precluded from participating in the decision" of such a body, ob serves that "it is generally held that in such case he ought not to par ticipate in the deliberation which precedes the decision. The reason assigned," he adds, is that "if the person who has not the right to con cur in the decision, participate in the deliberation, or be so much a present even, it is impossible to know whether he has or has not in fluenced the result."

1. See G. O. 1 of 1858.

2. O'Brien, 240; DIGEST, 59. And see G. O. 24, Dept. of th Platte, 1869; G. C. M. O. 10, Dept. of Texas, 1873.

3. This was actually done in a recent case; the proceeding being course disapproved by the reviewing authority. See G. C. M. O. 7 Dept. of Dakota, 1882.

taining the challenge, and establishing that the member does not stand indifferent,[1] rests upon the challenging party, and that a member, like a juror, is presumed to be qualified till he is shown to be the contrary;[2] 2d, that where any reasonable doubt exists of the indifference of the member in the case to be tried, it will be safer and in the interest of justice to sustain the objection and excuse him.[3] And this although the court may thus be reduced below the legal minimum and it may not be convenient to recomplete it. For, the convenience of the service is less to be regarded than the obligation to administer justice. The majority of military writers certainly lean rather in favor of supporting challenges than rejecting them,[4] and the proceedings of courts-martial have been not unfrequently disapproved in General Orders for the reason that valid objections to members have failed to be allowed.[5]

The Determination of the Challenge. After such free interchange of views as may be desirable, a vote, in the manner prescribed by Art. 95, is taken upon the objection;[6] the question to be voted upon being—shall the challenge be allowed? A

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1. "The law aims to exclude bias, &c., from a jury so far as the infirmity of human nature and the imperfections of human institutions will permit." State *v.* Benton, 2 Dev. & Bat. 215. "Exact and absolute impartiality is not to be had. The utmost that can be attained is that jurors should be as impartial as the lot of humanity will permit." Com. *v.* Hill, 4 Allen, 591. And see Burr's Trial, 370, 416.

2. U. S. *v.* Watkins, 3 Cranch C. 579; State *v.* Benton, 2 Dev. & Bat. 214; People *v.* Stout, 4 Parker, 108; Stewart *v.* State, 15 Ohio, 155; Holt *v.* People, 13 Mich. 227; People *v.* Brotherton, 47 Cal. 388.

3. Black *v.* State, 42 Texas, 377; R. R. Co. *v.* Munkers, 11 Kans. 223; Holt *v.* People, 13 Mich. 224.

4. Kennedy, 54; Napier, 94; De Hart, 115; Benét, 69; Coppée, 67; G. C. M. O. 66 of 1875; G. O. 13, Dept. of the Potomac, 1867.

5. See G. C. M. O. 82 of 1868; G. O. 16, Dept. of the Ohio, 1865; Do. 11, Dept. of Cal., 1865; Do. 13, Dept. of the Potomac, 1867; Do. 14, Dept. of La., 1868; Do. 20, Dept. of Arizona, 1870; Do. 45, Dept. of the South, 1873; Do. 5, Dept. of the Gulf, 1873; Do. 36, 47, Dept. of Dakota, 1874; Do. 15, Id., 1875; G. C. M. O. 10, 71, Dept. of Texas, 1873; Do. 44, Id., 1875; Memo., Dept. of the Columbia, June 19, 1874. But "while courts are prone—and justly so—to deal liberally with prisoners in the matter of challenges, it should not be forgotten that this right to protection may degenerate into a means for annoying officers against whom prisoners are prejudiced." G. C. M. O. 35, Dept. of Dakota, 1884. (Gen. Terry.)

6. See Pipon & Col., 51.

majority of course decides. Where there is a tie, it should be held, upon the analogy of all deliberative assemblies,[1] that the objection is not sustained; and to this effect has also been the practice of the civil courts.[2] Simmons[3] indeed declares that "when the votes are equally divided the decision is given in favor of the challenge being allowed," and this statement has been repeated by O'Brien.[4] In the absence, however, of positive law or regulation, such a rule could rest only upon usage, and no usage to this effect can be said to exist in our service. So, the British rule that where there is a tie vote upon a challenge, the president of the court shall have a casting vote,[5] has not—it need hardly be observed—been adopted in our law. In the procedure of American courts-martial, a tie vote upon an objection to a member, as upon any other proposition, is *no vote*, *i. e.* is not the indispensable majority, and the objection is not sustained.[6]

Procedure upon a Decision. The court having come to a conclusion upon the cause of challenge assigned, the doors, (the court having cleared,) are opened, and, the parties and the member who had retired being present, the decision is announced by the president. If it is that the challenge is not sustained, the member retakes his seat and the proceedings continue in the regular course. If the reverse is the result, and the member is, as it is commonly phrased, "excused," he withdraws permanently; whereupon the court, if five members still remain, goes on with its business.[7] If the sustaining of the challenge has reduced the number to four, the court, as it cannot proceed, adjourns and reports the fact through its president to the convening authority. The latter, if he deems it expedient, will issue an

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1. "An equal division upon a question is a decision of it in the negative." This, on the ground that—"the votes given for the negative" are "sufficient in number to neutralize the votes given on the other side." Cushing, Law and Practice of Legislative Assemblies § 303.

2. See U. S. *v.* Watkins, 3 Cranch C., 443.

3. § 497. And to this effect is now the statute law, as to challenges of members other than the president. Army Act § 51. (5.)

4. Page 240.

5. Army Act § 53. (8.)

6. See DIGEST, 479.

7. After a challenge interposed by the accused has been acted upon, it is proper for the judge advocate to ask him if he has any "further objections." G. C. M. O. 67, Dept. of Dakota, 1882.

order adding to the court a member or members, or detailing a new court altogether.[1] As already indicated, members thus added will be liable to challenge in the usual manner; and, in the event of a new court being appointed, embracing any of the members of the former court, these will become again subject to challenge in the same manner as when upon the original detail.[2]

A Member excusable only upon Challenge. It remains to remark that the proceeding authorized by Art. 88 is the only one by which a member may be relieved from attendance by the court. Except upon a challenge duly made and sustained, the court cannot excuse a member,[3] nor, of course, can a member in any case excuse himself.[4] Simmons[5] and Kennedy[6] have sanctioned the court's permitting a member, excepted to for personal prejudice or hostility, to withdraw voluntarily if he desires it, without his objection being regularly passed upon; and their view has been inconsiderately repeated by O'Brien[7] and De Hart.[8] Our Article, however, clearly conveys no authority for the excusing by the court of members at their own request, and such action has been repeatedly condemned in General Orders.[9] Where an officer detailed upon a court-martial deems himself disqualified, from prejudice or otherwise, to sit upon a particular trial, he should, if there is time, communicate the facts to the convening authority and ask to be relieved.[10]

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1. In the British practice, members excused or challenged may be replaced by officers detailed to attend the court for the purpose and called "waiting officers." Rules of Procedure § 17. (D.,) and Second Appendix. At an early period in our army a similar purpose was served by "supernumerary" officers. De Hart, 115; O'Brien, 240. This practice has been referred to in Chapter XII.

2. De Hart, 89.

3. DIGEST, 73. And see G. C. M. O. 27, 33, Dept. of Dakota, 1881; also Orders cited under this head, *post.*

4. G. O. 66, Dept. of the Platte, 1871. *Contra*, see Sackville's Trial, VI, VII,—a precedent without authority in this country.

5. § 500.

6. Page 54.

7. Page 239.

8. Page 118.

9. See G. O. 21 of 1853; Do. 66, Dept. of the Platte, 1871; Do. 43, d., 1875; G. C. M. O. 73, Dept. of Texas, 1873; Do. 25, Dept. of rizona, 1880. *Contra*—G. O. 34, Dept. of the Gulf, 1875.

10. DIGEST, 73; G. O. 43, Dept. of the Platte, 1875. And see G. C. [. O. 25, Dept. of Arizona, 1880.

Where this cannot be done prior to the trial, the member, before being sworn, should make known the fact of the objection either directly to the party interested in raising the same,[1] or preferably to the court in the presence of the parties, so that one or the other party may formally take the exception unless he elects to waive it.[2]

III. THE GROUNDS OF CHALLENGE.

Classification. At the common law, the causes for challenge to jurors were divided into four classes: those *propter honoris respectum*, (on account of a respect for nobility;) *propter delictum*, (on account of crime;) *propter defectum*, (on account of defect, that is to say personal or legal incapacity;) and *propter affectum*, (on account of favor, or bias.[3])

Challenges propter honoris respectum. This kind of challenge, says Coke, could be taken only to a "peere of the realm or lord of parliament, for these, in respect of honor and nobilitie, are not to be sworn on juries."[4] And he adds:—"When any of the commons is to have a tryall, either at the King's suit, or between partie and partie, a peere of the realm shall not be impanelled in any case."[5] It need hardly be observed that no challenge, answering to or resembling this one, is known to the procedure of the courts of this country, where every man is the peer of every other man before the law.

Challenges propter delictum. The term "*delictum*" refers to an infamous crime, that is to say a crime affixing infamy, in the legal sense, upon the offender,—as a capital crime or a felony.[6] Of the crime which is the ground of challenge the juror must have been duly convicted, and the proper proof to sustain the challenge is the *record* of such conviction.[7] An instance of a valid challenge of this class would hardly be possible in the

1 See G. C. M. O. 73, Dept. of Texas, 1873.
2 See G. O. 66, Dept. of the Platte, 1871.
3 Co. Litt., 156, b. And see Simmons § 502.
4 Co. Litt., 156, b.
5 Id. And see 2 Gabbett, 391.
6 Co. Litt., 158, a; State v. Squaires, 2 Nev. 230; Tytler, 225; Adye, 176.
7 2 Hawkins, c. 43, s. 25; Tytler, 225; Adye, 176.

military practice, and no case is known in which one has been interposed.

Challenges propter defectum. Challenges of this class are of two kinds: 1. Those based upon some physical or mental defect; 2. Those based upon an incapacity created by law.

1. Of the former class—"unsoundness of mind, or such defect of the mind or the organs of the body as render him incapable of performing the duties of a juror,"[1] as also sickness, deafness, and intoxication,[2] are specified by the authorities as causes properly exempting a juror from serving, and constituting ground of challenge. So, at military law, Hough[3] states it as one of "the legitimate causes of challenge" that the officer from age, deafness or other infirmity, is incompetent to discharge the duties of a member."

2. The legal incapacity upon which the *second* class of challenges *propter defectum* is based is one created by statute or established by the common law. Certain of the incapacities at common law, as alienage and minority, are adopted by the statutes of most of the States as legal disqualifications in the case of jurors, and, under the provisions of Sec. 800, Rev. Sts., the same facts would be held to be valid grounds of challenge in the U. S. courts.

But neither alienage nor minority would be recognized as such grounds at military law, where neither the age, nativity, nor civil status of officers is matter of positive statutory regulation, and where it is required of members of courts-martial in general simply that they shall be commissioned officers, and shall have military rank.[4] If indeed a member has not been duly commissioned or appointed, or if his commission has been vacated by operation of law under Sec. 1222 or 1223, Rev. Sts., by his accepting or exercising the functions of a civil office, or his accepting or holding an appointment in the diplomatic or consular service, he will be challengeable *propter defectum*. So, if he has not military rank,

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1. State *v.* Squaires, 2 Nev. 230.

2. Schœffler *v.* State, 3 Wis. 828; Jesse *v.* State, 20 Ga. 164; Pierce State, 13 N. H. 555.

3. Page 943, note. "The members should not be deaf, or blind, or boring under any illness that may prevent their constant attendance." I., 48. And see D'Aguilar, 102.

4. See Chapter VII.

as if he is a professor of the Military Academy,[1] he will be similarly challengeable.

Further, a challenge of this class will be valid in a case of an officer incapacitated by statute from sitting upon the particular or any court. Thus an officer of the regular army detailed upon a court for the trial of militia, or an officer of marines placed on a military court when not detached for service with the army, or a retired officer sitting upon any court-martial, would be subject to challenge *propter defectum.*

Challenges propter affectum. This is by far the most numerous class of challenges taken to jurors, and so to members of military courts. It includes all the grounds and facts of objection from which an inference of bias or partiality on the part of the juror or member must be, or may be, inferred.

Challenges for principal cause and for favor. Here is a proper occasion to note an important distinction in the law of challenge, especially applied to challenges *propter affectum*,[2] by which challenges to jurors are distinguished as (1) challenges "for cause" or "for principal cause," (sometimes termed "principal challenges,") and (2) challenges "to the favor," or "for favor."

Of "*principal*" challenges of this class the cause alleged is a specific fact of such a nature that, being admitted or proved to exist, it raises *per se*, and necessarily, a presumption of bias or prejudice which cannot be rebutted and the effect of which is absolutely to exclude the juror. Of such causes, among the most conspicuous are the following:—declared enmity; fixed and decided opinion on the merits; having been summoned as a material witness on the merits; relationship within a certain degree; direct personal interest in the result of the trial; having served on the grand jury which found the indictment; having sat upon a former trial of the defendant; having conscientious scruples which will influence a verdict.

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1 See Chapter VII.

2 It may be remarked that the challenges of the three classes already noticed, *propter affectum*, *propter delictum*, and *propter defectum*, are all properly "principal" challenges: the privilege, crime, incapacity, in any case needing but to be shown to exist to substantiate the objection as a matter of course.

ıallenges of this class "*for favor*," that is to say for being · of one side or the other, the grounds are not such as, of ves, imply bias; the question of their sufficiency in law 'holly contingent upon the testimony, which may or may :ording to the character and significance of all the cir- ıces, raise a presumption of partiality. Such are chal- ounded upon the personal relations of the juıor and one ›arties to the case; their relationship when not so near as :itute "principal cause;" the entertaining by the juror of ied opinion or impression in regard to the merits of the is having an unfavorable opinion of the character or con- the prisoner; his having taken part in a previous trial of ɔner for a different offence, or of another person for the same ıilar offence; or some other incident, no matter what, (for ınds of challenges "to the favor" are as various as the in- that affect human feeling,[1]) which, alone or in combina- :h other incidents, may have so acted upon the juror that d is not "in a state of neutrality" between the parties. In ; remarked by the court in a leading case, the distinction ı these two classes of challenges is that, in the former the ion, that the juror is incompetent, is a conclusion of *law* :tained facts; in the latter, the question whether he is so is a question of *fact* to be determined by the particular ;tances in evidence.[2]

ial grounds. Keeping this distinction in mind as of ı passing upon military as well as civil cases, we will pro- consider the chief grounds of challenge of the present *propter affectum*,—which, as has been said, comprises the

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challenge to favor applies to any man where there is sufficient ɔ suspect he may be more favorable to one side than to the Rollins *v.* Ames, 1 N. H. 350.

ɔple *v.* Bodine, 1 Denio, 308. And see Freeman *v.* People, 4 People *v.* Stout, 4 Parker, 110; Mann *v.* Glover, 2 Green, 204. cipal" challenges were heretofore specially distinguished in from challenges to the favor in that while the former were passed the court, the latter were determined by sworn "triers"—two ıt persons, usually members of the bar, or jurymen already found nt—who, being designated for the purpose by the court, heard ɜnce *pro* and *contra*, and decided, as a question of fact, whether · was biased. Now, however, in a considerable number of the s also in the federal practice, (see Sec. 819, Rev. Sts.,) triers : away with, and all disputed challenges are decided by the

great majority of the exceptions which come to be taken to m bers of courts-martial. Some of these will be found to be p liar to the military practice, but the greater part are commo that both of civil and military courts.

These grounds of exception will be examined in order u the following heads:—1. Opinion formed or expressed; 2 terest; 3. Relationship; 4. Personal prejudice or hostilit Intimate or peculiar personal relations; 6. Having taken p a former trial or inquiry; 7. Being a material witness in the 8. Miscellaneous grounds.

Opinion Formed or Expressed—*Expressed opi It need not proceed from ill will.* Whether an o formed and expressed upon a case shall be held to affect th petency of a juror, or of a member of a court-martial, pr depends upon its nature and extent, irrespective of any pe feeling of ill will, or the reverse, on the part of the juror or ber;[1] such personal feeling in fact, when entertained, treated as a separate and distinct ground of challenge.

Must be positive and definite. The opinion, prop disqualify the juror or member, should be a positive and u fied one. As remarked by the court in an adjudged ca opinion, necessarily to exclude a juror from the panel, n "absolute, unconditional, definite and settled, in distinctio one which is hypothetical, conditional, indefinite and unc The mind must be, for the time being, settled and at rest the question of the prisoner's guilt, or upon the questio trial."[2] Such an opinion would ordinarily be one either

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[1] The [illegible] that the expressed opi [illegible] must proceed from ill will or [illegible] except in New J [illegible] Dutch. 588.) nev [illegible]

[2] [illegible] must be serious, not "jo [illegible] must also be one made i [illegible] serving as a juror. [illegible] in expressing a [illegible] wish for the success [illegible] the opinion a s [illegible] — Much more is th [illegible] a good cause. [illegible] evidence of part [illegible]

ı personal knowledge of the facts, or acquired from some ble source—as from a party to the case, from hearing the ɜnce upon a previous trial or preliminary investigation, from ersations with witnesses, &c. But if the opinion be fixed lefinite, it does not matter how unreliable the quarter from h it is imbibed. If the mind of the juror or member be ssed by a clear and settled opinion, it should be held to dis- fy him, however or whencesoever derived.[1] A decided on, it may be added, need not be expressed in a public man- Hough[2] mentions a case of an opinion, casually expressed ivate, which was held sufficient ground of challenge.

ansient opinion or impression, insufficient. On the hand, an impression or cursory opinion upon the merits ɜase or the guilt or innocence of the accused, which has no decided hold upon the mind, and will fail to influence ıdgment in the presence of sworn testimony, will not, as it d generally by the authorities, properly exclude a juror or ɜer of a military court, upon challenge. Such, chiefly, are ight impressions or shifting opinions so frequently formed public rumor or common report, as well as those gathered such material as the gossip of acquaintances, casual con- ions with persons who were not witnesses and have no per- knowledge of the facts and, especially, articles in *newspa-*

In a case in New York, the court, referring to impressions

It is the preconceived opinion that renders him incompetent, and ɜ source from which that opinion is formed or derived." State *v.* ., 7 Iowa, 307. If the opinion be decided, it is no matter that it be l "from the report or hearsay of others. Many men form their ns from the statements of their neighbors in whom they have con- ɜ. Indeed there are many men who have more confidence in the sed opinions of their intelligent neighbors than they have in their Reynolds *v.* State, 1 Kelly, 229. The fact that a juror has made mind on *insufficient* grounds is held *especially* to indicate a dis- ing bias. See 1 Burr's Trial, 370.

'recedents. 715.

'he general rule that a juror must be superior to all exception not be carried to such a length as to run the risk of defeating the ' justice by excluding from the panel persons who have expressed ɜfinite opinion of the merits of a case, where * * * it has ɜ a subject of general conversation." Irvine *v.* Bank, 2 W. &). "Sustaining challenges on (such) slight grounds tends to :he administration of public justice in the hands of the most ıt and least discriminating portion of the community, by whom

derived from the source last mentioned, remark:—"It is qu obvious that if jurors are on such grounds to be rejected, it w be impossible at the present day to administer justice in ca sufficiently exciting to inspire a newspaper paragraph."[1]

Hypothetical opinions. Of this general description are the opinions characterized in the books as "hypothetical;" th is to say opinions derived chiefly from rumor, hearsay, or oth imperfect information, which, proceeding upon the supposit "that the facts are as they have been represented or assumed be," take, when expressed, a hypothetical form. As where t juror declares that he has formed an opinion, if what he has he is true; or, if what he has heard or read is true, he believes t prisoner to be guilty or innocent, as the case may be. T belief, the continuance of which is conditional upon the proof the trial according with the information of the juror, is held general, not to constitute a sufficient ground of challenge.[2]

Test of intermediate opinions. Where the opinion of juror is something more than slight, but at the same time is positive, being in fact an opinion falling between the two tremes described, this test of its sufficiency to exclude upon c lenge has been applied by the courts, *viz.—whether it is so f as to require evidence to remove it.* If the answer of the ju when interrogated on this point, or the drift of the evidence the hearing, is in the affirmative, it is held to be generally s to conclude that his mind is so far preoccupied as to render l

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the safety of the accused may be endangered and the proper admi tration of the laws put to hazard." Moran v. Com., 9 Leigh, 651.

1 Sanchez v. People, 4 Parker, 535. And see State v. Medlicot Kans. 280; People v. Mather, 4 Wend. 230; People v. Bodin Edmonds, 56; People v. Hayes, Id., 582; U. S. v. McHenry, 6 Bla ford, 503; 1 Burr's Trial, 370.

2 In State v. Sater, 8 Iowa, 420, the hypothetical opinion held to disqualify the juror was "if what he had heard should be pro upon the trial, he had an opinion made up." In Burk v. State, 27 I 43[illegible] the court observe of a similar declaration: "It was equivalen saying [illegible] if the facts shall be as I have heard, then I have an opini [illegible] then I have none, and I have no opinion as to the truth of th facts [illegible] the general principle that hypothetical opinions do [illegible] State v. Potter, 18 Conn. 166; People v. Mat 4 W[illegible] Mosher, 8 Johns. 445; People v. Fulle Parker [illegible] People v. Stout, 4 Parker, 71; Mann v. Glover, 2 Gr [illegible] State v. Benton, 2 Dev. & Bat. 213.

competent.[1] In a case in California,[2] where a juror stated, on challenge, that he had formed an opinion which it would quire evidence to remove, the court observe:—"In the mind of is juror" the prisoner "is held guilty before a single witness stifies against him; reversing the rule of law that presumes a son innocent till his guilt is *prima facie* established by evi-nce."

The opinion should be as to guilt or innocence. It is a neral rule that the opinion of the juror, to affect his compe-cy, should be one upon the merits of the case, that is to say—ere a verdict is to be rendered—upon the guilt or innocence the accused.[3] Thus, as held in several cases, a belief merely t a homicide or a murder has been committed is not an opinion o the guilt of the party charged.[4] Nor, as ruled in a further e,[5] is a belief, that the prisoner killed the person for whose rder he is indicted, such an opinion; for "the killing," as arked by the court, "being but one element of the crime, is sistent with the prisoner's innocence of murder." A general vorable opinion of the prisoner as a bad man has been held fficient *per se* to disqualify a juror;[6] and the same has been d as to the entertaining of such an opinion in regard to per-s in general when charged with crime,[7] or in regard to vio-ce and crime in general.[8]

. Cancemi *v.* People, 16 N. Y. 501; Fahnestock *v.* State, 23 Ind. ; Moses *v.* State, 10 Humph. 456; Cotton *v.* State, 31 Miss. 504; red *v.* State, 37 Miss. 296; Olive *v.* State, 11 Neb. 1. But where the laration of the juror was to the effect that, while it would require e evidence to change his opinion, the same would readily yield to dence, he was held to be competent. Guetig *v.* State, 66 Ind. 94.

. People *v.* Gehr, 8 Cal. 359. And see Sam *v.* State, 13 Sm. & M. 190.

. Where the juror entertains a decided opinion as to guilt or inno-ce, it is held to be unnecessary, and in fact improper, to ask him ther it, (the opinion,) is that the prisoner is guilty or innocent. e *v.* Shelledy, 8 Iowa, 503; People *v.* Williams, 6 Cal. 206.

. See O'Brien *v.* People, 48 Barb. 274; State *v.* Thompson, 9 Iowa, ; Cargen *v.* People, 39 Mich. 549.

. Lowenberg *v.* People, 27 N. Y. 336.

. Monroe *v.* State, 23 Texas, 210; People *v.* Mahoney, 18 Cal. 180; erson *v.* State, 14 Ga. 710; G. C. M. O. 44, Dept. of Cal., 1883. rwise, however, where such opinion has become so fixed as appar-to bias the mind. See Willis *v.* State, 12 Ga. 444.

. People *v.* Reynolds, 16 Cal. 129.

. Davis *v.* Hunter, 7 Ala. (N. S.) 135.

An opinion upon a question of *law* involved in a case will o will not disqualify a juror or member, according as it does does not amount to an opinion upon the guilt or innocence of th accused. A juror or member who was of opinion that the a charged was not a crime or offence would properly be held i competent on challenge.[1] So a fixed opinion that a statute u der which a party is indicted is unconstitutional must necessar disqualify a juror, since it involves a conclusion that he is n guilty in law;[2] but an opinion that the statute is constitutio and in force has been held not to affect the juror's competen since it is merely an opinion upon an abstract legal questio Similarly it was held no objection to jurors that they thou the law under which the prisoner was accused "a good law for, as the court remark, "such opinion has no tendency to pro or disprove the issue."[4]

Where a juror had no opinion, or only a hypothetical opini on the merits, it was held that the fact that he had made up mind as to the *punishment* proper to be inflicted on the prison in case of a conviction, did not affect his competency.[5]

Effect of personal disclaimer of bias in connec with opinion. The assertion of a juror under examinati that his opinion in regard to the case is not such as to influe his action on the trial will properly carry considerable wei except where such opinion is one of a decided character, as wh it will require evidence to remove it. In that event his perso declaration that the opinion will not bias his judgment or a his verdict, will not in general, as it has frequently been he avail of itself alone to remove the objection taken to him u challenge.[6] Similarly, while a disclaimer of bias by a challen

1. 1 Bishop, C. P. § 917; Com. *v.* Buzzell, 16 Pick. 153.

2. Com. *v.* Austin, 7 Gray, 51; Pierce *v.* State, 13 N. H. 536.

3. Com. *v.* Abbott, 13 Met. 120.

4. McNall *v.* McClure, 1 Lans. 32. And see U. S. *v.* Noelke, Blatchford, 554.

5. State *v.* Bill, 15 La. An. 114. And see Com. *v.* Buzzell, 16 Pi 155.

6. Sam *v.* State, 13 Sm. & M. 194; Morton *v.* State, 1 Kans. 4 Armistead *v.* Com., 11 Leigh, 663; Goodwin *v.* Blachley, 4 Ind. Willis *v.* State, 12 Ga. 447; Hudgins *v.* State, 2 Kelly, 176; Peop Gehr, 8 Cal. 362; Olive *v.* State, 11 Neb. 1; Greenfield *v.* Peop N. Y. 277. It is "not to be considered as any disparagement of

nber of a court-martial will always be deferred to with respect, rill properly fail to convince the court of his neutrality in the : where it appears that he has recently entertained decided ws concerning the criminality of the accused.[1]

pinion Formed but not Expressed. In the great ma- ty of cases of challenge for opinion, the opinion entertained the juror has naturally also been expressed, and thus in fact le known to exist. In a comparatively few cases only has question come to be raised whether the mere formation of an ion, without its being expressed at all, will affect the juror's petency. In Callender's case,[2] (tried in 1800,) it was held hase J. that the juror "must have delivered as well as formed opinion." This doctrine was affirmed upon Burr's trial, (in ,) by Chief Justice Marshall in the following terms:—"The is, that a man must not only have formed but declared an ion in order to exclude him from serving on the jury."[3] same view has been taken in some of the subsequent cases; ground being mainly that persons are more apt to be tena- s of and to abide by expressed opinions than those which in unexpressed.[4] The opposite, however, *viz:*—that an ion once fully formed in the mind, though not stated, will alify equally as if declared,—has been held in other and numerous cases.[5] Upon principle, the latter ruling cer- y seems the one to be preferred. It is the formation of the on which is the material and principal process; the expres- is but incidental. The formation constitutes the prejudg- and preoccupation of the mind; and if the opinion is dy decided, it scarcely becomes more so by being expressed.

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fides of the juror" that he should be held incompetent notwith- ing such a declaration. Willis *v.* State. In Hudgins *v.* State, the offer a natural explanation which, no doubt, accounts for many in which this declaration is made, in good faith, by jurors:—"The may think himself free from bias or prejudice because he harbors udge or personal ill will toward the accused."

See DIGEST, 71; G. C. M. O. 66 of 1879.

Wharton's State Trials, 697.

Burr's Trial, 44.

Boardman *v.* Wood, 3 Verm. 570; Noble *v.* People, Breese, 30. ee State *v.* Morea, 2 Ala. (N. S.) 277.

State *v.* Potter, 18 Conn. 172, and cases cited; Com. *v.* Buzzell, k. 155; Rathbun *v.* People, 21 Wend. 509; State *v.* Johnson, r, (Miss.) 399.

Some habitually silent persons do not readily assert their convictions; and some who are secretive brood over them till they become even the more intense for not being uttered. Some again hesitate to declare their sentiments concerning the acts of others, either from an aversion to gossip and scandal, or from a sense of honor and justice which will not permit them to do a possible injury in a case of any doubt, or in one in which there may be extenuating circumstances. Thus the better reasons are deemed to be clearly on the side of holding that the *expression* of the opinion should not be regarded as essential to disqualify the juror or member of court-martial, upon challenge, where the same is admitted or clearly shown to have been deliberately formed and to be of a decided character.

Opinion Formed or Expressed in the Preferring of Charges. The subject of challenges for opinion may be concluded by noticing the class of military cases in which the fact that a member of the court-martial was the officer who *preferred the charges* has been urged as ground of objection, generally on the part of the accused. In repeated cases, published in General Orders, where it appeared that a member had preferred or initiated the charge, and had done so, not ministerially under the orders of a superior, but after a personal investigation of the facts, and was thus actually the accuser,[1] a challenge offered to him has been held valid; and, where the court has ruled otherwise their ruling has been disapproved.[2]

The objection in this class of cases is aggravated where the member challenged as having preferred the charges is also the person primarily affected by the offence committed,—as when

1. See construction of the terms "accuser and prosecutor," (in Art. 72,) in Chapter VI., also DIGEST, 70.

2. "It is difficult to believe that an officer who has made a preliminary examination into alleged facts, and has so far satisfied himself of the guilt of the accused as, in effect, to prefer charges against him," (involving here grave offences) "can bring to the trial of the case a mind so free from bias as to ensure to the accused the impartial trial to which he has an undoubted right." G. C. M. O. 82 of 1868. (Gen. Grant.) "The deliberate preferring of charges by the member was "a most unequivocal expression of opinion." G. C. M. O. 1, Dept. of Texas, 1880. (Gen. Ord.) And see G. O. 16, Dept. of the Ohio, 186[illegible]; Do. 14, Dept. of Pa., 1868; Do. 20, Dept. of Arizona, 1870; Do. [illegible] Dept. of the South, 1873; Do. 5, Dept. of the Gulf, 1873; Do. [illegible] Dept. of Dakota, 1874; Do. 18, Id., 1875; G. C. M. O. 13, Dept. of the

he charge is that his own order was disobeyed by the accused,[1] r that disrespect was shown him,[2] or that his property was tolen,[3] &c.,—especially as, in such cases, he is also generally he principal, or a material, witness.[4] Here, indeed, an addiional objection—that of personal prejudice or hostility—may ombine with that of having formed or expressed an opinion.

Personal Prejudice and Hostility. Under this head are ntended to be included:—1, Decided prejudice not amounting o positive enmity; 2, Feelings of actual enmity, animosity, malice or confirmed ill will.

Personal prejudice. The term "prejudice," as here emloyed, is to be distinguished from prejudice in its original sense f prejudgment. In *this* sense it has already been considered in eating of *opinion:* in its present sense it has reference to a senment in regard to the accused personally, *i. e.* as an individual r as an officer or soldier.[5]

The personal prejudice under consideration may be proved by vidence of any decided unfriendly or unfavorable language, pinion, action, &c., of the juror or member challenged. Thus was held good cause of exception to a member that he had aplied abusive and degrading epithets to the accused, (a soldier,)

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latte, 1873; Do. 10, 71, Dept. of Texas, 1873; Do. 44, Id., 1875; Memo., Dept. of the Col., June 19, 1874; Do. 88, Dept. of the Mo., 1883; Do. 8, Dept. of the East, 1884. See also, in this connection, G. O. 37, Dept. of Kans., 1864, where the fact that the same court had previously ased to be preferred against the accused the very charge upon which e was arraigned was held valid ground of challenge to *all* the members, verally, as being "evidence of the formation of an opinion" on the erits, and indeed "tantamount to an expression of that opinion."

On the trial of Col. T. H. Cushing in 1811, (Printed Trial, p. 7,) the cused objected to a member on the ground that he had intended to fer charges against the accused identical in part with those in the e. The member admitting the fact, the objection was sustained.

1. DIGEST, 70–71.

2. See case in G. C. M. O. 13, Dept. of the Platte, 1873; also Trial Lieut. Stanley, U. S. N., p. 323.

3. Simmons § 507.

4. DIGEST, 70; G. C. M. O. 51, Dept. of the Col., 1881; Do. 19, 1882.

5. As to the effect of personal prejudices in biasing the mind of a juror, Mann *v.* Glover, 2 Green, 203.

on the occasion of his arrest.[1] So, a decided expression of opinion by a member as to the unfitness of the accused, (an officer,) for any official position was held to charge him with sufficient prejudice to constitute ground of challenge.[2] Prejudice may also be implied from the relation of the member toward the subject matter of the charge, as where the violence or other misconduct for which the accused is to be tried was aimed at the member himself or resulted to his injury.[3]

Whether expressed or implied, the prejudice must be of a definite and positive character. A general objection interposed by the accused to a member on account of "some unpleasant circumstances growing out of their official relations" was held in Gen. Twigg's case to be indefinite and insufficient.[4]

Prejudice of commanding officer. Simmons,[5] (who is repeated by some of the later authorities,[6]) states in general terms that challenges have been admitted to members as being the commanding officers of accused persons, on the supposition that they might as such be prejudiced through "previous impe

1. G. O. 47, Dept. of Dakota, 1874.

2. G. O. 11, Dept. of Cal., 1865. That the objection must be *personal* is illustrated in a case, published in G. O. 72, Dept. of the East, 186[illegible] of a volunteer soldier, where the action of the court in allowing a challenge to a member on the "absurd" ground that he had a known and avowed prejudice against volunteer soldiers in general, was disapproved by the reviewing authority. So, on the Trial by Military Commission in 1864, of Milligan and others, page 73, an objection interposed by Milligan to a member who was a volunteer colonel from Mass.,—"because he is from a locality where there are extreme prejudices against Western men, and he is likely to be influenced by those prejudices," was, of course, disallowed. See in this connection the case referred to in DIGEST, 77, where the fact that a member had stated that he did not consider the accused officer a gentleman was held a good ground of objection, one of the charges to be tried being "Conduct unbecoming an officer and a gentleman." The sufficiency of this ground, however, may well be questioned.

On the trial of Capt. Kelly of the British navy in 1802, (Printed Tr. p. 3–4,) the court sustained a challenge by the accused to a member who had sat on a previous court-martial held for the trial of two seamen of his, (the accused's,) ship, which court, in its judgment, had "conveyed a censure" on the accused.

3. DIGEST, 71.

4. G. O. 4 of 1858.

5. § 510.

6. De Hart, 122; Benét, 73; Coppée, 65.

fect or *ex parte* knowledge of the circumstances inducing the trial." It is quite clear, however, that the mere fact that a member is the commanding officer—colonel, captain, &c.—of the accused is no foundation for a valid challenge.[1] Other circumstances must be shown fixing *actual* prejudice on the commander before an objection taken to him can properly be held sufficient. In our practice the principal instances in which a challenge to a member who was a commanding officer has been sustained have been those of cases in which either he was the preferrer of the charge or real accuser,[2] or those in which other causes combined to disqualify him—as that he was a material witness for the prosecution, or the very person against whom the offences of the accused has been committed.[3]

That it is in general inexpedient that the immediate commander of an accused, officer or soldier, should be placed upon a court ordered for his trial, is remarked by Simmons and subsequent writers.[4] In small commands, however, it is sometimes unavoidable.

Personal hostility, enmity, or malice. This is a valid ground of challenge equally in the civil and the military practice. In a case in Georgia[5] the court observe:—"The law requires that jurors should be * * * not liable to an objection on account of malice, ill will, hatred, revenge, * * * or the like." On Burr's trial,[6] a certain grand juror was objected to for that he "entertained a bitter personal animosity against" the defendant; and a sentiment of this nature being admitted by the juror to exist, the challenge was sustained. That the feeling must be a personal one, directed at the individual, and that it need have

1. DIGEST, 71; G. O. 73, Dept. of the South, 1873.

2. See G. O. 13, Dept. of the Potomac, 1867; Do. 16, Dept. of the Ohio, 1865; Ives, 91. Simmons (§ 510) writes that a challenge of a member as being a commanding officer should "obviously be allowed" where he has "taken an active part in promoting the prosecution or in bringing forward the charge." See G. C. M. O. 18, Dept. of the East, 1884.

3. See Trial of Lieut. Stanley, (U. S. N.) p. 323.

4. See—with Simmons § 510—Harcourt, 110; Bombay R., 7; De Hart, 122.

5. Monroe *v.* State, 5 Ga. 142.

6. Vol. 1, p. 41–43.

no connection with the facts of the particular case, has also specifically held.[1]

Among military authorities, Tytler[2] mentions "mali hostile enmity expressed by word or deed against the priso as one of the "causes of challenge impossible to be overru and other later authorities notice the same as among the de grounds of exception.[3]

The existence of the hostile feeling is generally shown l language or acts of the challenged juror or member— having charged the challenging party with a grave crime having publicly libelled him;[5] his having initiated agains a malicious suit or prosecution,[6] or grave charges on pe grounds; his having had a serious quarrel or difficulty witl in a personal or official capacity; his having been foiled tagonized by him in a contest for appointment, promotion, his having been in *any* manner injured by the challenging and consequently cherishing revenge or bitterness against &c. In an adjudged case[8] the point is noticed that ho once felt but no longer entertained will not properly affe competency of the juror.

Interest. Personal interest—pecuniary or other—in tl sult of a trial is a cause of challenge which has been chiefly fined to jurors in civil actions. The principle involved, how is applicable to criminal cases; so that a juror or member has a direct personal interest in the fact or question involv to be decided, *i. e.* to whom any reasonably certain subst advantage or detriment may result from the event of the ceeding, ought not, if objected to, to be permitted to sit o court. This ground of challenge has been recognized by

1. Brittain *v.* Allen, 2 Dev. 120.

2. Page 225.

3. See Simmons § 503; Kennedy, 54; Maltby, 30; Macomb O'Brien, 238, 239; Ives, 91.

4. Palmer *v.* Bogan, Cheves, 52.

5. Lewis *v.* Few, Anthon, 75.

6. Co. Litt., 157, b.; People *v.* Bodine, 1 Denio, 305.

7. See Coppée, 66. As where the member was the very against whom the offence had been committed. G. C. M. O. 13, of the Platte, 1873.

8. People *v.* Vermilyea, 7 Cow. 369.

military writers,[1] but, except in a single instance, it is one that is most rarely urged.

Claim to promotion. This instance is that of the objection sometimes taken by an accused officer to a member, that the latter will become entitled to promotion on account of seniority upon the accused being dismissed the service.[2] This objection is especially apposite in cases where a sentence of dismissal is mandatory upon a conviction of the offence charged. It may, however, also properly be made in a case where a dismissal may legally be imposed in the discretion of the court, and where, in view of the nature of the charge, such sentence is a probable one. It may also not improperly be taken in a case where a sentence of suspension for a certain term would be a reasonable and appropriate punishment for the offence, and where within such term a right to promotion, by reason of the compulsory retirement of a common senior, or otherwise, would accrue to the member if the accused were to be deprived of the same by the execution of such sentence.

Advancement in files. That a member will by the dismissal of the accused be merely advanced one "file" or number in the line of seniority toward promotion will in the majority of cases be too remote an interest to form a valid objection.[3] Cases however may occur in which such interest is not thus remote, and the court may in its discretion properly sustain the exception,—as where the number to which the member will be advanced is the *first* in the line of promotion to a higher grade; or where it is the *second*, and the senior officer at the head of the list is soon to be retired, or, by reason of the compulsory retirement of a common senior or otherwise, to be promoted.

Relationship. No instance is known in which this ground of challenge—familiar to the common law[4] and recognized in

1. O'Brien, 238; De Hart, 119.
2. Clode, M. L., 127; Benét, 73; Coppée, 66; Ives, 90; DIGEST, 71.
3. DIGEST, 71.
4. "For that the law presumeth that one kinsman doth favor another before a stranger." Co. Litt., 157, a. And at an early period the rule was adopted that the relationship must be within the ninth degree to exclude a juror. Finch's Law, 401; 1 Chitty, C. L., 541; 3 Black. Com., 53; 1 Bishop, C. P. § 901; Simmons § 504. This is still the general rule

a verdict, or in a vote upon a verdict, (as where the jurors [illegible] divided,) at a previous trial of the same case, he is *neces*[illegible] incompetent to sit in the pending case and will be set asi[illegible] challenge. This, "not," to cite the language of Chief Ju[illegible] Marshall on Burr's Trial,[1] that he is "suspected of per[illegible] prejudices, but" that "he has formed and delivered an opi[illegible] and is therefore deemed unfit to be a juror in the cause."

Otherwise, where there was no verdict or vote upon a ve[illegible] at the previous trial,—as where the case was dismissed b[illegible] court without proceeding to verdict. In such a case the juror [illegible] not challengeable "for principal cause,"[2] though, if his mi[illegible] has been in any manner biased,—as by his having heard evidence, arguments, &c., he will be liable to challenge "for favor."[3]

Similarly an officer of the army, who had been a member of a court-martial on a certain trial, would properly be excluded fro[illegible] acting upon a new trial for the same offence where one had bee[illegible] ordered or granted;[4] and this whether or not the former court ha[illegible] jurisdiction of the case, or whether the proceedings of the forme[illegible] trial were legal or illegal. Thus Attorney General Grundy, i[illegible] holding that the proceedings in a certain naval court-martial ha[illegible] been invalidated by a fatal omission therein, and that, in orde[illegible] to the trial of the accused, a new court must be organized, adds:— "The officers who sat on the former should all be excluded from the second trial. They have formed and expressed opinions upo[illegible] the case which would disqualify them from serving as jurors in a criminal case in a common law court; and I can see no reaso[illegible] why officers under the same circumstances should not be exclude[illegible] from a court-martial, especially as they are the triers of the fact as well as the law."[5]

But where the proceedings were terminated before a findin[illegible] was reached, as by the number being reduced below a minimum

1. Vol. 1, p. 416. And see Herndon *v.* Bradshaw, 4 Bibb, 45[illegible] Briggs *v.* Byrd, 12 Ire. 377; State *v.* Fox, 1 Dutch. 595; State *v.* Be[illegible]ton, 2 Dev. & Bat. 213.

2. Durell *v.* Mosher, 8 Johns. 445. And see Atkinson *v.* Allen, 1[illegible] Vt. 621.

3. See Whitner *v.* Hamlin, 12 Fla. 18, (a case deemed otherwise of doubtful authority.)

4. And so would a member or members who had acted on "a previous court by which the same accused had been tried for the same act, though under a different charge." DIGEST, 72.

5. III Opins., 398.

= entry of a *nolle prosequi*, or because of some military
ıcy, an officer who was a member would not properly be
led upon challenge from the subsequent court or trial,
s it appeared that the effect of the previous investigation
been so to bias his judgment that he no longer stood
erent between the parties.

rmer trial of a different case involving the same similar question. In the criminal law, neither the fact
a juror has served as such on a previous trial of the same
y for a separate instance of the same offence or for a similar
ice;[1] nor that he has taken part in the trial and conviction
nother and distinct offender separately indicted for an offence
ie same character;[2] nor even that he has similarly acted
the trial of an accomplice jointly indicted for the same
ce but who has been permitted to sever for trial,[3]—is held
a "principal cause" of challenge, *i. e.* necessarily to dis-
fy the juror. A challenge "to the favor," however, may
lowed in such cases, where it is satisfactorily shown that the
, by reason of having heard the testimony on the first trial,
herwise, has actually become biased by an opinion for or
ıst the present defendant.[4]
cases of this class at military law a similar test is to be em-
d. While it is certainly not *per se* valid ground of chal-
to a member that he has taken part in a previous trial of
ccused for a like offence, or in a trial for the same offence of
ıer soldier between whom and the present accused there had
criminal concert, yet if the previous hearing has induced
ormation of an opinion as to the guilt or innocence of
accused, the member is of course properly subject to
ption.[5]

ıving been a member of a previous court of inquiry. fact that a member of the petit or trial jury in a criminal

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Com. *v.* Hill, 4 Allen, 591; U. S. *v.* Watkins, 3 Cr. C., 443.
State *v.* Sheeley, 15 Iowa, 404.
U. S. *v.* Wilson, 1 Baldwin, 78; Adye, 174.
U. S. *v.* Wilson, *ante.*
Simmons § 513–9; Macomb, 31; De Hart, 121; Benét, 75.
officer is not properly competent to sit on a court-martial, who, as
nber of a previous *board of survey*, has joined in an opinion or
g unfavorable to the merits of the case to be tried.

: was a member of the grand jury which found the ir
at has uniformly been held to constitute conclusive grou
ncipal challenge;[1] and so the fact that a member of a
artial was a member of a court of inquiry previously he
.e same case has been regarded at military law as a sound
on to the member.[2] Whether the objection is to be held e
alid where the court of inquiry only reported evidence as
.t expressed an opinion in the case, is a question as to whic
ferent views appear to have been entertained by military w
but the weight of authority is in favor of the affirmative
good sense and reason certainly concur. In the pract
American courts-martial the fact of having been a mem
a previous court of inquiry by which the charges were i
gated is uniformly treated as an objection in the nature of a
lenge for "principal cause."[4]

If the investigation by the court of inquiry related not to
actual charges to be tried but to a similar matter or one involvi
a similar question, the member would properly be held subje
to challenge according as such investigation had or not impre
upon him an opinion as to the merits of the case.[5]

Having served on a regimental court from which an appeal is taken. All the authorities, English and American agree that in the case of an appeal, (taken in our law under the 30th Article of war,) from a regimental to a general court, a member who has acted on the former court will necessarily be excluded from the latter, upon challenge as for "principal cause." This for the reason that the regimental court, in every such case, has not only formed but expressed a specific opinion and conclusion.

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1. Stewart *v.* State, 15 Ohio, 159; Barlow *v.* State, 2 Blatchford, 114; Rice *v.* State, 16 Ind. 298; Gillespie *v.* State, 8 Yerg. 507; State *v.* Benton, 2 Dev. & Bat. 213.

2. See authorities referred to in next note.

3. That is to say, of those who have expressed a decided opinion on the subject. See Simmons § 512; McNaghten, 177; Hough, (P.) 77; De Hart, 120; Coppée, 66; Benét, 75; Harwood, 68; DIGEST, 7; Hough, (P., 645, note,) well observes—"Whether they *give* an opinion matters not; every man *thinks* an opinion."

4. See G. O. 11, Dept. of Cal., 1866.

5. See Tytler, 223.

6. Tytler, 224; Adye, 173; 1 McArthur, 275; Delafons, 137; Hough, 512; Simmons § 508; De Hart, 119; Benét, 75; Coppée, 66.

ing a Material Witness. The fact that a juror has been noned by either party as a material witness in the same proing is held to be a "principal cause" of challenge.[1] This e ground that a witness is likely to be a partisan and either ve a personal prejudice or a decided opinion in the case.[2] larly, it is believed to be in general a valid exception to a ber of a court-martial that he is to be a material witness to merits:[3] otherwise, where he is to be called upon simply to ify as to character,[4] or as to some interlocutory point not maal to the main issue. It is not essential, however, that the mber should have been formally summoned.[5] If it is the fact at he is relied upon and is to be used as a material witness, he equally subject to challenge whether he has been summoned r not. Otherwise a party, by avoiding summoning his witness, ight secure his remaining on the court, to his own undue adntage and the detriment of public justice.[6]

If a member has given material testimony on a previous trial r investigation of the same case,[7] or on a previous trial or investgation of another case or matter of the same or a similar nature,[8] e question whether he should be allowed to sit in the pending se will depend on the weight of the evidence which may be fered to show either that he is prejudiced or that he has formed opinion; the exception being in the nature of a challenge "to e favor."

While the mere fact that an officer is to be a material witness

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1. Co. Litt., 157, a; Com. *v.* Joliffe, 7 Watts, 585.

2. Com. *v.* Joliffe, *ante.*

3. See Simmons § 511; D'Aguilar, 102; Bombay R., 12; De Hart, 3; Benét, 74; Coppée, 66; DIGEST, 70. [A somewhat conflicting w in G. C. M. O. 134, Dept. of Dakota, 1884, is, in the opinion of author, too broadly stated.] *A fortiori* where he is the *prosecuting* ness.

4. See authorities cited in last note; also Com. *v.* Joliffe, 7 Watts, 5.

5. The mere fact that the member was an important or material wits in the case, (whether or not formally summoned,) was held suffit ground of challenge in cases in G. O. 4, Dept. of the West, 1861; 20, Dept. of Arizona, 1870; Do. 18, Dept. of Dakota, 1875; also Trial of Lieut. Stanley, (U. S. N.,) p. 323. And see Pipon & Col., 51.

In Com. *v.* Joliffe, 7 Watts, 586, it is remarked by the court that party should purposely omit to summon a juror whom he designed se as a witness, this fact "might be a cause of challenge to the favor."

See Harper *v.* Kean, 11 S. & R., 298.

See Delafons, 136; Hough, (P.) 684.

in a case to be tried does not *disqualify* him from sitting member of the court,[1] it is agreed by the authorities th should not be detailed as such if it can be avoided without se prejudice to the service.[2] But in the absence of a challen cannot, as heretofore indicated, be excused by the court.

If a member is called upon in the midst of a trial to be terial witness, he may then be challenged by the party a whom he is to testify, provided it was not known to this pa the outset, that he was to be used as a witness.[3] But if not lenged, the court has no power to relieve him, nor can he r himself; the order of the convening authority being nec for such a purpose.[4]

Miscellaneous Grounds. Certain other grounds of lenge which have been recognized as valid in the civil pr may here be noticed. These are—that the juror has been pered with;[5] that he has been bribed;[6] that he is charact by a moral obliquity;[7] that he will not convict on circumst evidence;[8] that he has taken an oath or assumed an oblig as a member of an association or combination which preven standing indifferent between the parties;[9] that he has c entious scruples in regard to the imposition of the death pe which will affect his verdict;[10] that he does not speak Engl that he has not sufficient intelligence.[12]

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1. See authorities cited in next note; also Bell *v.* State, 44 Ala.
2. Sullivan, 58; Simmons § 511; Hickman, 17, 246; Clode, M 127; O'Brien, 239; De Hart, 123; Benét, 74; G. O. 11, Dept. N. West, 1864. And see Hacker's Trial, 5 How. State T., 1181.
3. See *ante*.
4. DIGEST, 73.
5. Co. Litt., 157, b; Knight *v.* Freeport, 13 Mass. 217.
6. Co. Litt., 157 b; U. S. *v.* Morris, 1 Curtis C. 35; Tytler, Maltby, 30; O'Brien, 238.
7. McFadden *v.* Com., 23 Pa. St. 12.
8. Gates *v.* People, 14 Ills. 433; Jones *v.* State, 57 Miss. 684; *v.* Pritchard, 15 Nev. 74.
9. Fletcher *v.* State, 6 Humph. 249; Com. *v.* Livermore, 4 Gra People *v.* Reyes, 5 Cal. 347.
10. U. S. *v.* Cornell, 2 Mason, 104; U. S. *v.* Wilson, 1 Baldwi U. S. *v.* Ware, 2 Cranch C., 477; and many cases in the State re The rule is held to be the same where the death penalty is discreti *viz.* where the statute enjoins death *or* some lesser penalty, as imp ment in a penitentiary. Gross *v.* State, 2 Carter, 329.
11. Fisher *v.* The City, 4 Brewst. 395.
12. State *v.* Roundtree, 32 La. An. 1144.

None of these grounds are likely to arise in a military case. Should indeed an exception in the nature of any of those mentioned be taken before a court-martial, the determination, under the Article, of its "relevancy and validity" may be assisted by a reference to the authorities here cited under the similar subject.

Concluding Remark—Liability to Challenge not Disqualification. In the course of this Chapter, jurors and members of courts-martial against whom valid causes of objection exist, have, in some instances, been said to be "incompetent" and "disqualified." These words are frequently employed in the reports and treatises as convenient terms, but it must not be inferred from their use that it is intended that the juror or member is, by reason of his liability to challenge, disqualified to act in the court, or that his acting thereon impairs the legality of the proceedings. In an adjudged case in New York,[1] it is held:—"A challenge to a juror does not go to the jurisdiction of the tribunal: though a juror may be incompetent as such, the trial is not invalidated." And in a case in North Carolina[2] the court observe:—"There was good cause of challenge to the juror. But that does not vitiate the trial: * * * by not making the objection the party waived it." So, at military law, where the party entitled, under Art. 88, to object waives, or fails to take, his objection, or where the same, being made, is improperly overruled by the court,—while the reviewing authority may, and, in the latter contingency, generally will, *disapprove* the proceedings, the legal validity of the finding and sentence is, in neither case, affected.[3]

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1. Clark *v.* Van Vracken, 20 Barb. 281.

2. Briggs *v.* Byrd, 12 Ire. 381.

3. Case of Lieut. Keyes, DIGEST, 72; Do., XV Opins. At. Gen., 2; Do., 15 Ct. Cl., 533; Opin. of At. Gen., in Lieut. Armstrong's case, of June 28, 1882. That an accused does not, by a plea of *guilty*, give any advantage to which he may be entitled by reason of an improper disallowance by the court of a challenge interposed by him to a member,—see G. C. M. O. 88, Dept. of Dakota, 1878.

CHAPTER XV.

ORGANIZATION—ARRAIGNMENT—CONTINUANCE—NOLLE PROSEQUI.

In this Chapter will be considered the subjects of—I, Th Organization of the Court by the swearing and qualifying of th members; II, The Arraignment of the Accused, and herein Standing mute; III, Continuance and Adjournment; IV, No *Prosequi* or Withdrawal.

I. THE SWEARING OF THE COURT.

The accused (and judge advocate) having fully exercised, been afforded an opportunity to exercise, the right of challen of members of the court accorded by Art. 88 of the code, th members, (if at least five in number,) proceed to complete th organization as a court, for the trial, by formally qualifyin themselves as prescribed in Art. 84.[1]

The Official Oath. This Article is as follows:—"*The ju advocate shall administer to each member of the court, before th proceed upon any trial, the following oath, which shall also taken by all members of regimental and garrison courts-marti 'You, A. B., do swear that you will well and truly try determine, according to evidence, the matter now before y between the United States of America and the prisoner to tried, and that you will duly administer justice, without p tiality, favor, or affection, according to the provisions of the r and articles for the government of the armies of the Un*

1. Art. 48 of the Code of James II, from which our Article is in p derived, directs that the members "shall take an oath for the due adm tration of justice according to these Articles, or, (*where these Artic not assign any special punishment,*) according to their consciences, u best of their understandings, and the custom of war in the like cases.

tes, and if any doubt should arise, not explained by said articles, n according to your conscience, the best of your understanding, the custom of war in like cases; and you do further swear that will not divulge the sentence of the court until it shall be pub-ed by the proper authority; neither will you disclose or discover vote or opinion of any particular member of the court-martial, ss required to give evidence thereof, as a witness, by a court ustice, in a due course of law. So help you God.' "

he Administering of the Oath — *To be repeated on ry trial.* This oath, being required to be administered to court before proceeding "upon any trial," must be taken w before the trial of each and every case tried by the same t.[1] No such procedure is recognized as swearing a court *rally* at the outset for all the cases to be tried by it. The t must be qualified separately for every case precisely as if were the only case to be adjudicated; such qualifying being essential preliminary to its being authorized to "try and rmine" the same.[2]

he accused to be present. The Article does not require the oath should be administered in the presence of the used, and it is not *essential* that he should be present when same is administered. Being, however, already legally ent for the purpose of exercising his rights under Art. 88, properly continues to be present at the qualifying of the rt; and it is a well-established usage of the service, specifically gnized in the Army Regulations—par. 914—that the oath uld be administered in his presence.

orm of administering. The form of administering the n is as follows: The Members and the Judge Advocate having n in their places, the latter reads aloud the form, prefacing it

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See O'Brien, 246; De Hart, 129; Macomb, 34; Benét, 80; Hard, 76; Army Regs., par. 888; G. O. 60 of 1873. And compare, a similar construction of a corresponding provision of the *militia* of Mass., Coffin *v.* Wilbour, 7 Pick. 150.

contrary view expressed by Atty. Gen. Berrien in 1829, (II Opins.,) on the authority of Tytler, (p. 230,) was dissented from by Atty. Taney in 1831, (II Opins., 460.) Tytler's view has been long abandoned in the British practice. See Kennedy, 45; Harcourt, Simmons § 440, 521, 527.

See DIGEST, 67; Simmons § 440.

by addressing the members, by name and rank as given in the Order, as follows—'You, A. B., Colonel, &c., C. D., Major, &c., E. F., Captain, &c., (and so on,) do, severally, swear that you will well and truly try and determine,' &c.; each member—though this is not an essential feature—properly keeping his right hand raised during the reading.[1] No Bible or copy of the Evangelists is used in our service.

To be taken by every member separately. The Article requires the administering of the oath to "each member." While all the members present are sworn together at the same time, they are not sworn collectively, *i. e.* as a court or body, but separately and individually as members. So, a member not present at the organization but taking his seat later in the day or on another day must be then separately sworn; and so must a member subsequently added to the court by the convening authority.

Members may affirm. It is declared in Sec. 1, Rev. Stat. that "in determining the meaning of the revised statutes, * * a requirement of an oath shall be deemed complied with by making affirmation in judicial form." Any member therefore who objects to being sworn may be affirmed; the word "affirm" in the place of "swear" being used in addressing him, as his name occurs in the order of rank, thus: 'You, A. B., C. D., &c., severally swear, and you, E. F., do affirm, &c.' In affirming the reference to the Deity at the end of the oath may properly be omitted.

Oath not otherwise to be varied. A member, however, would not be entitled to have the form of the oath further varied as to himself on the ground that, as expressed in the Article or administered in practice, it was not binding upon a person of his religious belief. Every officer of the army, whatever his religious opinions, accepts, on entering the service, the provisions of the military code as obligatory upon him and he cannot refuse to undertake or to abide by the prescribed obligation in the

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1 See O'Brien, 240; Macomb, 32; De Hart, 128. The two first named writers state that the members repeat the words of the oath after the judge advocate. This however is not now the practice. The members only raise the hand at the end of the ceremony, as an indication of assent.

2 [illegible] Dept. of the East, 1864.

:e. A member, however, may properly be allowed to *ac-ny* the ceremony by any form, not inconsistent with the tions of the Article, by which the oath may in his estimate :ndered more obligatory as to himself. Thus a Roman Cath- may take in his hand, &c., a copy of the Evangelists, or an elite a copy of the Pentateuch.[1]

he **Nature of the Obligation.** The oath, which some ers have remarked upon as investing the court with a two- capacity assimilated to that of judge and jury,[2] contains several ict engagements which may briefly be noticed here, to be rated from time to time hereafter.

ese engagements are :—

To "try and determine according to evidence." Here iember binds himself not to be influenced by any private ledge or information which he may have in regard to the but to decide it by the testimony, oral and written, which e duly laid before the court.[3]

To try, &c., "the matter now before" the court. By words the members engage to pass upon the specific of- alleged against the accused, of which they will properly been advised by having had the charges read or laid before as heretofore indicated. Moreover, having thus bound elves to pass upon the particular charges presented, they t, after they have once been sworn, legally entertain new dditional" charges or specifications setting forth further es. Such new offences must be made the subject of a sep- trial by the same court, or be referred for trial to a separate ; or the proceedings before the original court may be dis- iued, and the court be re-organized, and re-sworn to try all iarges old and new.[4]

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ee Clode, M. L., 126 ; Simmons § 447.

ee Kennedy, 9 ; Simmons § 440 ; Benét, 78.

ee Adye, 187 ; G. O. 21, Dept. of the Ohio, 1866 ; G. C. M. O. pt. of Texas, 1874. Compare Rex *v.* Rosser, 7 C. & P. 648. testimony must be that of course which is introduced upon the lar trial. The court cannot, under its oath, allow its conclusions ffected by evidence taken at another trial. G. O. 29, Dept. of tte, 1869.

mmons § 415, 458 ; Griffiths, 61 ; De Hart, 102 ; Benét, 91 ; Di- 8 ; G. C. M. O. 39 of 1867 ; G. O. 13, Northern Dept., 1864.

3. To "duly administer justice without partial favor or affection." Where the proper challenges have b duly passed upon, the members will be prepared to proceed to minister justice with strict impartiality. If any member, h ever, is at this stage conscious of any such partiality, favor affection as would materially influence his judgment in the ca he should apply to the convening authority to be relieved, si he could not properly take the oath.

4. To administer justice, &c., "according to" the Art cles of war. The member here undertakes to administer ju tice, not according to his own private views of justice or h personal opinion as to what the law should be, but in strict com pliance with the actual statutory provisions of the military cod relating to the offence or offences charged.[1] He thus engag not to convict unless the offence as charged is within the defin tion or scope of the article under which the charge is laid, an to adjudge only such punishment as the article may authorize.

5. In case of doubt, to administer justice according his conscience, best understanding, and the custom war. In certain cases the Articles of war fail fully to def the offence made punishable, and in most cases do not prescri a particular sentence to be imposed in any event but leave punishment to the discretion of the court. In such cases "doubt," the member will be guided by his "conscience," (i his moral sense, or natural feeling of justice,[2]) and his "und standing," (or intellectual faculty,) in determining whether accused was actuated by the guilty *animus* essential to the offe charged, and in estimating the amount of criminality invol in his act and thus the measure of punishment adequate the He will also, where necessary or appropriate, recur to the cus of war or military usage, as indicating whether certain acts to be considered as constituting a certain offence, whether a c tain defence is to be regarded as valid and sufficient, whethe particular punishment is or not sanctioned by the practice of service, &c.

The customs of the service have already been treated of

1 Digest, 88. G. C. M. O. 41, Dept. of Texas, 1874.
2 See O'Brien, 244.

nent part of the law military, and need not therefore be welt upon.

Vot to divulge the sentence, or the votes or opinions e members. This—the "obligation of secrecy"—was uced into the oath at an early period,[1] the purpose of its on being described to be to protect the members from such ment or other prejudice as might ensue upon their personal on the court being made known, and thus the better to their independence and promote the ends of justice.[2] A r purpose might well have been to prevent—in case of con- ı—the judgment of the court coming to the knowledge of cused, and of other persons perhaps implicated with him, : moment at which it would be legal to proceed with the ion of the sentence, thus guarding against escapes and ıting the efficient administration of the punishment.

: ***obligation, how violated.*** The Article, in imposing ›ligation, had no doubt mainly in view disclosures made in sation, or otherwise personally and extrajudicially, by the ers. The violations, (few indeed in number,) which have ed have, however, mainly consisted in statements made in itten record of the trial; as a statement, for instance, that te was unanimous; or that all the members concurred in ding or sentence, or in a vote on a single charge or specifi- ; or that certain members designated composed the majority minority upon some *issue*,—as the issue upon a challenge ecial plea,—voted on in the course of the proceedings.[3] disclosure of the vote or opinion of a member or members ıny material *interlocutory question*, raised during the trial ıssed upon by the court when cleared for deliberation, also be a substantial violation of the obligation assumed

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:e Clode, M. L., 130.

/tler, 227–9; 1 McArthur, 306–8; 1 Clode, (M. F.) 168; Stoc- Hist. Brit. Army, 50; Macomb, 33; Benét, 78. The obligation ared by Clode, (M. L., 130,) to that which, on grounds of public is imposed by their oath upon grand jurors.

e Sullivan, 78; Tytler, 324; Simmons § 615; De Hart, 179; Di- 8. It is no justification for a statement in the record of the vote ;entence or other subject, that such statement was intended for and consideration of the reviewing officer only. G. C. M. O. t. of Texas, 1883.

by the [illegible] though no *issue* were joined upon such qu
Otherwise however where the question thus acted on w
[illegible] the merits of the case.[1]

For a member to disclose *his own* vote or opinion wo
[illegible] be equally at variance with his
[illegible] as if he were to divulge that of another mem

While the members by the last clause of the oath, ar
[illegible] from divulging the *sentence* only, it is clear that a
[illegible] divulge the fact of an *acquittal*. S
[illegible] would not indeed be a violation of the *oath*, b
[illegible] considering the obligation of the judge ad
under the [illegible] it would be a breach of official tru
[illegible] and would constitute an offence under Art. 62.

The obligation, how discharged. As to the *sente*
when the same has been promulgated in General Orde
otherwise made public by the proper superior authority
member is no longer bound to secrecy in regard to its terms
[illegible] the members, an individual memb
authorized to divulge the same only when "required to giv
dence thereof" before "a court of justice." By the term "
[illegible] was evidently intended a civil or criminal court
State; a court-martial could scarcely have been contemplate
A member when duly summoned as a witness before a

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[1] [illegible] Dept. of the Mo., 1868, it was hel
[illegible] to the prejudice of good order and military discipli
[illegible] general court to make known the vote and opinic
[illegible] given while the court was considering, with cl
[illegible] connected with the case then properly
[illegible] was added by the reviewing officer, (Gen. Sl
[illegible] The order administered in compliance with the 69th, (
[illegible] only in matters pertaining to the
[illegible]

[illegible] In a case in G. C. M. O. 24, Dep
[illegible] disapproved, as contrary to the spirit of
[illegible] the action of the president of the court in adding over his signa
[illegible] a statement to the effect that, for rea
[illegible] disagreed with the majority in a certain finding,—thus
[illegible] his own opinion

[3] See Chapter XIII

[4] In the late British articles of war, the words "*or a court-mart*
[illegible] after the words "court of justice." In the present
[illegible] the term employed is—"unless thereunto required i
[illegible] law

rt for the purpose indicated, is not only authorized but ged, if the testimony required of him on the subject be erial, to make the disclosure of the vote, &c., if the same be wn to him; and this whether testifying in person or by osition. It will be contempt if he refuses.[1]

II. THE ARRAIGNMENT OF THE ACCUSED.

he Accused to be Free of Unnecessary Restraint. e court being now duly qualified and organized for the trial, l the accused being before it and ready to plead, the next proding is the formal arraignment. To this the accused, in the itary as in the civil procedure, is entitled to come free from ckles, irons or other bonds, except in some extreme case where attempt to escape or to do violence is to be apprehended;[2] l he is entitled to remain similarly unrestrained pending the l.[3]

orm of Arraignment. The arraignment is the calling of prisoner to the bar of the court to answer to the matter rged against him.[4] In the practice of courts-martial it cons in reading to the accused the charges and specifications, and nanding of him whether he is guilty or not guilty of each, arately and in order. The order pursued where there are eral charges is to arraign first on the 1st, 2d, and succeeding cifications of the First charge, and then on that charge; next the separate specifications of the Second charge, and then on t charge; and so with the rest. In our practice the arraignnt is conducted by the judge advocate, both he and the used properly standing during the ceremony. Where two or re prisoners are to be tried together on joint charges, each is arately arraigned.

he reading of the charges and specifications, besides being formal and proper basis for the questions which are to sucd and the answers which are to follow, will be useful in

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See *In re* Mackenzie, 1 Pa. Law J. R., 356.

2 Hawkins, c. 28 § 1; 1 Bishop, C. P. § 731; Simmons § 473; omb, 30; O'Brien, 235–6; De Hart, 113; G. O. 52, Dept. of the , 1869; Circ., Dept. of the Mo., Feb. 19, 1872.

See DIGEST, 218–9, and authorities cited in note.

2 Hale, 219; 4 Black. Com., 322.

affording the accused an opportunity to compare the [illegible] previously served upon him with the draft on which [illegible] arraigned and so detect any variance that may exist. It [illegible] however, *essential* to an arraignment that the charges and [illegible] fications be read on this occasion. If they are numerous [illegible] elaborate, and if the accused has assured himself that the original [illegible] have not been modified since his receipt of the copy he may [illegible] well—the court assenting—waive the reading, as at criminal law [illegible] the defendant may waive the reading, on arraignment, of the [illegible] indictment.[1]

So, by consent of parties, (and with the assent of the court) the arraignment may be further simplified by the omission of the questions usually addressed by the judge advocate to the accused as to how he pleads to the several charges, &c., and by the entry in the record of a general plea of guilty or not guilty as made to the whole, or of this plea to a part and a special plea or pleas to another part of the pleadings, or of a special plea or pleas to the whole—as the case may be. Where this form is resorted to, it is generally in connection with a waiver of the reading of the charges.

Answer of the Accused. The *answer* to the arraignment (which is no part of the arraignment itself,) will ordinarily consist of the plea of the *general issue* or of a *special plea*. In some cases, in lieu of a plea, a *motion*—as a motion to quash or strike out—will be made. It is possible, however, that the accused will make no answer whatever to the arraignment, but will remain wholly silent. Before proceeding, therefore, to consider in a separate Chapter the subject of Pleas and Motions, we will pause here to notice the rare contingency of *standing mute*.

STANDING MUTE.

The Law on the Subject. At an early period of the English law, in all capital cases except treason, if the prisoner stood mute, and the jury to which the question was referred,[2] found that he did so from obstinacy or malice; or if he persisted in answering "foreign to the purpose;" he became liable to the

1 [illegible] State [illegible] And see 1 Bishop, C. [illegible] § [illegible]

2 See [illegible] as to this procedure.

Forte et dure,"[1] a barbarous mode of punishment and tor-
›t finally done away by legislation till the reign of Geo.
In other cases, (and in all cases of felony after the date of
egislation,) where the prisoner stood mute or refused to
, the court proceeded—as if he had pleaded guilty—immedi-
y to conviction and sentence;[2] and to the same effect appears
have been the practice of the earlier British courts-martial.[3]
ut, by a later statute of 7 & 8 Geo. IV, criminal courts, upon
risoners refusing to plead, were authorized to order a plea of
not guilty to be entered; and in the present Rules of Procedure,
§ 35, A,) it is specifically directed that if the accused before a
ourt-martial "refuses to plead, or does not plead intelligibly, a
lea of not guilty shall be recorded on each charge."

In this country, it was specifically adjudged in a federal court
1818 that the penalty of *peine forte et dure* was unknown to
: laws of the United States.[4] Moreover a series of statutory
visions, dating from 1790, have—as the law is stated in Sec.
2 of the Revised Statutes where they are now consolidated—
cted that "*when any person indicted for any offence against
United States, whether capital or otherwise, upon his arraign-
it stands mute or refuses to plead or answer thereto, it shall be
duty of the court to enter the plea of not guilty on his behalf
he same manner as if he had pleaded not guilty thereto.*"[5]

.t *military* law, the first enactment on the subject was that of
. 70 of the code of 1806, and this has been repeated in Art. 89
:he present code, of 1874, as follows:—"*When a prisoner,
aigned before a general court-martial, from obstinacy and de-
rate design, stands mute, or answers foreign to the purpose, the
rt may proceed to trial and judgment, as if the prisoner had
aded not guilty.*"

'rocedure. The application of the Article being restricted
ases where, from "obstinacy and deliberate design," the ac-

As to the description and history of this penalty, see 2 Hale, 319;
lack Com., 327–9; 1 Chitty, C. L., 426; Adye, 152; Tytler, 234;
ifors, 173; De Hart, 137.

1 Chitty, C. L., 425; 4 Black Com., 325; Rex *v.* Mercier, 1 Leach,
U. S. *v.* Hare, 2 Wheeler, C. C., 300; De Hart, 137–8.

Simmons § 555. And see Tytler, 234–5.

U. S. *v.* Hare, 2 Wheeler, C. C., 301.

See U. S. *v.* Hare, *ante*. A similar statute exists "in probably all
states." 1 Bishop, C. P. § 733 *a*.

cused will not submit himself to be duly arraigned, it may become necessary for the court—where the accused stands mute, (or, what is equivalent,) refuses to plead,) or answers foreign to the purpose, and it is not clear that he does so from mere wilfulness—to satisfy itself by an investigation whether he acts from contumacy only or from some cause beyond his control.

In such a case, in the civil practice, a jury is ordinarily empannelled to try and determine whether the party is mute, &c., from malice or self-will, or *ex visitatione Dei*—that is to say from a natural impediment or some other physical or mental infirmity. If the jury find that the silence, or refusal, results from the latter cause, the trial is, or not, proceeded with, according to the capacity of the prisoner to plead and defend with proper intelligence. If not found capable, he is remanded to custody for such disposition as the existing statute law may direct.[2]

In the military procedure, such an inquiry devolves of course upon the court, which, therefore, proceeds, with the assistance of such testimony, medical or other, as may, through the judge advocate, be made available, to determine the preliminary question. If it find the accused to be apparently insane or idiotic, it suspends the proceedings, reporting the facts to the convening authority, for such action as he may think proper to take or to recommend to be taken by the Secretary of War—as, for example, a discharge from the service, or a committal to the Government Hospital for the Insane.[4] If again—a contingency which must be of still rarer occurrence in the Army—the accused be found

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[1] See Hawkins, c. 30, s. 1; 4 Black. Com. 324; Tytler, 233; O'Brien, 94; 1 Hale, 135. O'Brien, (p. 150,) includes also within the description of standing mute the case of an accused who, after a special plea interposed by him has been held inadmissible by the court, pertinaciously adheres to the same, refusing to plead to the merits. And see Benet, 108.

[2] See Hawkins, c. 30, s. 5; 4 Black. Com. 324; 2 Gabbett, 318; 1 Hale, 135; Rex v. Jones, 1 Leach, 102; Rex v. Mercier, Id. 183; Rex v. Steel, Id. 451; Rex v. Pritchard, 7 C. & P., 303; Rex v. Dyson, Id. 305; Rex v. Hakon, Ry. & Mo. 78; Queen v. Goode, 7 Ad. & El. [illegible] 1 Lew. 239; Thompson's Case, 2 Id. 137; Frith's Case, [illegible] How. St. Tr. 307; Com. v. Braley, 1 Mass. 102; Com. v. Moore, [illegible] Hathaway, 13 Id. 299; Com. v. Hill, 14 Id. 207; Com. v. [illegible] Va. Cas. 206; Matter of Turner, 5 Ohio, 544. And [illegible] Freeman v. People, 4 Denio, 9.

[3] On the subject of this inquiry by a court-martial, see Griffiths, 57; [illegible] Benet, 95.

[4] Under Sec. 1848, Rev. Sts.

ave lost, wholly or in part, the faculty of speech or hearing, nay, if sufficiently intelligent and able to communicate his ights and wishes, plead and defend through an interpreter, n the civil practice: if not thus intelligent or capable, his will properly be reported by the court to the convening er, for discharge or other appropriate action. If, on the r hand, the court determine that the accused stands mute, "from obstinacy and deliberate design," it will proceed as ated in the Article; the accused himself remaining liable separate charge and trial (by a different court) for such ce as may, if his conduct has been aggravated, have been lved in his acts or words.[1]

will be seldom, however, in practice that a court-martial be required to proceed as enjoined in Art. 89; and but a few nces of such proceeding are to be found published in the ral Orders.[2]

III. CONTINUANCE.

is upon the arraignment and before the plea that application ore frequently than later, made to the court for a continu- The subject of continuances will therefore best be con- ed at this point.

t. 93. This subject is now regulated by the 93d Article of which is as follows:—"*A court-martial shall, for reasonable , grant a continuance to either party, for such a time, and en as may appear to be just:* Provided, *That if the prisoner close confinement, the trial shall not be delayed for a period r than sixty days.*"

If the acts or words of the accused amount to a menace, or a dis- disturbing the proceedings, his conduct will come within the iption of Art. 86. But a mere neglect to plead is not a contempt. 1 *v.* Oliver, 1 Minn. 202.

See cases in G. O. 96, Dept. of N. Mex., 1862; G. C. M. O. 62, of Va., 1865, where, upon the accused answering foreign to the se when arraigned, the court caused a plea of not guilty to be d on the record, and proceeded with the trial. A more con- us case was that of C. L. Vallandigham, tried by military com- n in 1863, who, denying the jurisdiction of the court, refused to to the charge; whereupon the plea of not guilty was entered as ized by the Article. Printed Trial, p. 12; G. O. 68, Dept. of hio, 1863.

Construction and Effect of the Article, in ge

This provision, which appears first as an Article of war revised code of 1874, was originally sec. 29 of the Act of 3, 1863, ch. 75. Prior to this statute the only provision subject was that of a paragraph, (now numbered 885,) Army Regulations, which directed that:—"Application for or postponement of trial must, when practicable, be made to the authority convening the court. When made to the court, must be before plea, and will then, if in the opinion of the co well founded, be referred to the authority convening the cou to decide whether the court should be adjourned or dissolve and the charges reserved for another court." This regulatio which had in view applications to be made only or mainly by th accused, and to be made to, or finally passed upon by, the co vening authority, and which required that applications addre to the court should be presented before plea, was practica *superseded* by the statute, which authorizes either party, indiff ently, to apply to the court for continuances, empowers the co alone to grant the same, and permits them to be granted at a stage of the proceedings. The Article in effect transfers to th court a function—similar to that exercised by the civil courts continuing cases from one term or session to another[1]—which regulation had devolved upon the convening officer. Applic tions to delay the trial, or rather the assembling of the court the trial, made before the date designated in the Order for su assembling, must of course always be addressed to that office but such applications are of rare occurrence.

The Article, by the words "shall grant," &c., is deemed entitle the party to the continuance asked, (or to some contin ance,) as a right, upon his showing "reasonable cause" therefor

1. The Article, however, though employing the more legal te "continuance," in lieu of the more colloquial "postponement" used the regulation, does not employ it in the strict sense in which it commonly used in the civil practice, but in a more general sense as cluding any temporary stay of proceedings, to be granted by the co at the instance of a party. See *post*—"Duration of the continuance."

2. See DIGEST, 76. A refusal by the court to grant a continua where reasonable cause therefor is exhibited, while it will not affect legal validity of the proceedings, will, if the accused appears to h been thus prejudiced in his defence, or to have otherwise suffered in tice, "properly constitute good ground for disapproving the senten or for mitigating or partially remitting the punishment." DIGEST,

chief question under the Article is as to what consti-
ionable cause. Before considering, however, the ground
iuance, we will notice certain minor points as follows:—

ime for making the Application. The Article, in
; for the granting of continuances "as often as shall
be just," is deemed to authorize the making of appli-
r motions for the same *at any time pending the trial.*
: sufficient causes for granting such applications may
equently arise at later stages of the proceedings,[1] yet
: ground for a continuance exists and is known prior to
arraignment, the proper time for making the appli-
upon the arraignment and before plea.[2] If the facts
ould warrant the granting of the application are fully
this time by the party, and he does not then present
on but goes on to plead to the general issue, he may
roperly be held to have *waived* his title to a continuance
such facts.

Parties equally entitled under the Article. The
ias been expressed by some of the authorities, (writing
he enactment of the present Article,) that a continuance
: granted more readily to the accused than to the pros-
in a case at least where the ground presented is the
of a material witness.[3] The existing Article, however,
aking any distinction between the parties, and the court
i general make none, whatever the ground of the appli-
it should look to the reason offered for the claim rather
ie source from which it proceeds.

ion of the Continuance. The Article declares that
ance shall be granted "for such time as may appear to
except in the single case where the accused is "in close
ent," (a term explained in a previous Chapter,[4]) when,

. C. M. O. 35 of 1867; Do. 128 of 1876; G. O. 24, Dept. of
874; Do. 63, Dept. of Dakota, 1872; Do. 40, Fourth Mil.
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ions § 535; Kennedy, 66–7; Clode, M. L., 136; O'Brien,
Iart, 129.

Kennedy, 66; De Hart, 129.

Simmons § 533; De Hart, 132; Benét, 87. The view ex-
founded upon a ruling on Col. Quentin's Trial, p. 35.

ter IX—"ARREST."

[illegible] shall not be delayed for a period longe[illegible] [illegible] limit in the excepted case is thus [illegible] that it was contemplated that continu[illegible] for very considerable periods approxi[illegible] the continuances from term to term [illegible]. In Capt. Howe's case,[1] the trial, for [illegible] noticed, was, at the instance of the [illegible] nearly two years. This indeed was ex[illegible] it may be said that the period for [illegible] may legally be granted is without other [illegible] exigencies and convenience of the service [illegible] may impose. In practice, a continu[illegible] than a month is rare.

[illegible] **Continuances.** The Article further authorizes [illegible] "as often as shall appear to be just." [illegible] be renewed, or new ones may be allowed, [illegible] limit as to number. A proper occasion for the [illegible] would be presented where a material [illegible] arrived at the time expected and to which the [illegible] had extended, but there was reasonable [illegible] that he would arrive presently. So, where a [illegible] already been granted for one cause, the court [illegible] to accede to a subsequent application based [illegible] ground, provided the same could not have been [illegible] time the former was presented, and is itself [illegible] properly evidenced.[2] But it is to be observed that, [illegible] and especially a reiterated, application, a stricter [illegible] should ordinarily be required than in the case [illegible] motion: this indeed appears to be the view of the

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[illegible] Gen., 500.

[illegible] McCulloch, 6 Mo. 448.

[illegible] a less degree of diligence would satisfy the [illegible] third application." * * * * The court [illegible] greater diligence on each successive appli[illegible] Thomas, 21 Ills. 89. And see 1 Bishop, C. P. [illegible] application is made on the same ground as a [illegible] based upon new facts which have arisen since [illegible] 70 Ills. 112; Wilson v. State, 33 Ga. 207. [illegible] continuance on account of an absent witness

It may be added that, under the wide discretion permitted it, allow a stay of proceedings when and as often as it may deem ist, a court-martial, like a civil court, may grant a continuance t the trial of *an issue formed upon a special plea* as well as at ny other stage. But here too a stricter rule as to proof may in eneral properly be applied than where the trial is upon the eneral issue.[1]

Grounds for Continuance. It was declared by Lord Mansield in Rex *v.* D'Eon,[2] that—"no crime is so great, no proceedngs so instantaneous, but that, *upon sufficient grounds*, the trial ay be put off." A similar condition is expressed in our Article f war by the words "*for reasonable cause.*" Whether the cause ated in any case is a reasonable one, the court alone is empowed, in its discretion, to determine. But on this subject there e certain general rules which, though not absolute or imperave, have been recognized as properly guiding the discretion of e court; and these rules, which are in general also applicable the military practice, will be referred to in considering the incipal grounds for continuances—as follows:

1. Absence of a material witness. This is the most freent of such grounds, both upon civil and military trials. In e case last above cited,[3] Chief Justice Mansfield clearly lays own the rules governing the granting of a continuance for this use. "Three things," he observes, "are necessary to put off trial—1. That the witness is really material and appears to the urt so to be; 2. That the party who applies has been guilty of neglect; 3. That the witness can be had at the time to which e trial is deferred." In our own law, it is directed by par. 886 the Army Regulations, as follows:—"Upon application by the cused for postponement on the ground of the absence of a witss, it ought distinctly to appear on his oath—1st, that the witss is material, and how; 2d, that the accused has used due ligence to procure his attendance; and, 3d, that he has reason-

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uld show renewed diligence to secure his attendance used since the t continuance. Powers *v.* Lockwood, 9 Johns. 132; St. John *v.* nedict, 12 Johns. 418.

. See Wade *v.* Birmingham, 2 Chitty, 5.

. 1 W. Black. 514.

. Rex *v.* D'Eon, 1 W. Black. 514; Id., 3 Bur. 1514.

[illegible]ble ground to believe, and does believe, that he will be able to [illegible]rocure such attendance within a reasonable time stated."[illegible]

The affidavit or statement. This regulation is in terms confined to the case of an application by the accused; the previous par., (§ 885,) having also, as we have seen, contemplated the making of such applications mainly at least on the part of the defence. But the statute of 1863, (Art. 93,) enacted since the date of the originals of these regulations, having provided for the granting of continuances to either party indifferently, the judge advocate, when the motion comes from him, may properly be called upon to make a similar statement, though his oath to the same need not be required. In practice the accused is generally sworn to his statement by the judge advocate. But—the regulation being directory only—the taking of the oath, and even the making of the formal statement, may be waived by the opposite party, and in practice is, with the consent of the court, not unfrequently dispensed with where the continuance asked is but for a brief period and there is no reason to question the good faith of the party applying.[1]

But as a general rule, and especially where the continuance will entail an unusual delay, or is asked for at an unusual stage of the proceedings, the preferable course is for the party to present with his application the statement indicated in the regulation, setting forth explicitly therein the three points enumerated.

In the first place, therefore, he will properly state, not only that the witness is *material*, but *how* he is material, and this by specifying as to what feature of the case he is to testify and what it is expected that his testimony will be in substance or effect.[2] And this testimony should appear to be substantial and appropriate to the issue of guilt or innocence under the specific charge, not testimony as to character merely,[3] or testimony which is only

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[illegible] W[illegible] the application if the regulation [illegible] refrain from insisting that [illegible] accept a modified form." DIGEST [illegible]

[illegible] If the witness is material, [illegible] that his testimony is to be [illegible] Dakota, 1872.

[illegible] W[illegible] Jones, 8 East, 34; People [illegible] W[illegible] of the Lakes, 1871. Where

ıulative or reiterative as to a point already sufficiently ex-
ted in proof.[1] The main object, it may be noted, in speci-
g the facts proposed or expected to be proved by the witness
ıot only that the court may better judge as to his materiality,
that the opposite party may have an opportunity to *admit*
ı facts or that the witness will so testify, and the occasion for
ntinuance thus be done away with. Where indeed, as is not
ly the case in a criminal proceeding, the personal appearance
statement of the witness will be of manifest and material
ntage to the party applying for the continuance, he ought
in general to be deprived of the same by anything short of
nqualified admission and stipulation of record, by the oppo-
party, that the witness, if present, would testify as to certain
, and that his testimony would be true.[2]

condly, the party applying for the continuance should set
in his affidavit or statement sufficient facts to show that he
ısed *due diligence* to secure the attendance of the witness—
at, without fault of his own, he has but just been advised
ıe existence or of the whereabouts of the witness; or "that
ıas endeavored without effect to serve on him a subpœna,
ifying the exertions used;"[3] or that the witness has been duly
d but refuses or neglects to appear and that an attachment
een or is about to be issued for him; or that he has been
summoned, or ordered to attend, but residing, or being
ned or on duty, at a great distance from the station of the
, has not had time to reach the same;[4] or that, having once
ded in obedience to a summons or order, he has, without the
or knowledge of the applicant, withdrawn or disappeared,
annot be found, &c. And in every case, where the exist-

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er, the proposed testimony as to character is really important to
cused, and the judge advocate is not prepared to admit it, the
may properly grant a reasonable continuance.

See People *v.* Thompson, 4 Cal. 238; Parker *v.* State, 55 Miss.
also Mull's Case, 8 Grat. 696; Rhea *v.* State, 10 Yerg. 258;
T, 76. This general rule may also be departed from in a proper

Compare Goodman *v.* State, 1 Meigs, 197; People *v.* Vermilyea,
. 369.

Vharton, C. P. & P. § 591.

r that he has been recently separated from his witnesses, by the
of station of his regiment or company. See case in DIGEST, 77,

ence of the witness has been known, the party should state, in general terms merely that due diligence has been used, specifically what acts have been done by him and efforts made procure his attendance.[1] Where the witness is absent on accou of illness, the party should cause this fact to appear by a me ical certificate or medical testimony, or, if such cannot be o tained, by some other reliable means of information.[2] From th facts exhibited the court will judge whether a reasonable dil gence has been employed, or the party has been chargeable wi laches: if the latter is apparent the application will regularly denied.[3] And so will it be denied where there is reason for b lieving that the witness is absent by the procurement or conn ance of the applicant himself.[4]

Thirdly. The party, in his affidavit or statement, should a date, not unreasonably distant, within which he should sho

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1. Wharton, C. P. & P. § 591; Pence *v.* Christman, 15 Ind. 2 Brady *v.* Malone, 4 Iowa, 146; People *v.* Thompson, 4 Cal. 438.

2. Wharton, C. P. & P. § 591; 2 McArthur, 32; Simmons § 5 Maltby, 64; Macomb, 36; O'Brien, 246–7; De Hart, 131.

3. "It must be shown that the absence of the witness is not attri table to any neglect of the applicant." Simmons § 533. And see K nedy, 67; Maltby, 64; O'Brien, 246. In Capt. Powlett's case, McArthur, 28,) one of the reasons for which the court-martial refuse continuance to the accused was that he had not "taken the pro measures for preventing" witnesses, who had been at hand, from go abroad and thus absenting themselves at the time of the trial. Cl (M. L., 136,) remarks: "A postponement to get up evidence, wh ought to have been ready at the opening, would not be regular." civil cases it is held not due diligence to rely on the mere *promise* of witness to attend; and where this has been done by a party, he will be allowed a continuance on account of the absence of the witn Freeland *v.* Howell, Anthon, 198; Day *v.* Gelston, 22 Ills. 102; S *v.* Cross, 12 Iowa, 66; Mackubin *v.* Clarkson, 5 Minn. 247; Camp *v.* Blanke, 13 Kans. 62; Hensley *v.* Lytle, 5 Texas. 500;—even wh the witness has in fact been subpœnaed by the opposite party. Mc *v.* Goelitz, 27 Ills. 18.

4. Wormley *v.* Com., 10 Grat. 658. On the other hand, a conti ance will not be denied where the party, though apparently charge with laches, has really been prevented from securing the testimony reason of the acts or omissions of the other party or his agents. U *v.* Duane, J. B. Wallace, 10.

The accused in a military case cannot be charged with laches wh the attendance of the witness has been prevented by superior aut ity,—as where the witness is detained on duty in the field or on o active service. See case in G. O. 63, Dept. of Dakota, 1872, note DIGEST, 76; also case referred to in ID., 77, § 3.

facts specifically set forth, that he is reasonably justified in lieving that he will be enabled to secure the presence of the tness at the court.[1] Where indeed, in the opinion of the court, does not appear that the personal attendance of the witness y reasonably be expected to be secured within the time med, a continuance may still be granted for the purpose of ibling the party to obtain the *deposition* of the witness—the ound next to be noticed.

. Time to procure the deposition of a distant witness. ere this is the ground for the continuance sought, the applii ion should be presented as soon as practicable, and should sfy the court that the testimony is material and that the wit- s, from physical causes or otherwise, cannot attend the court person, or, by reason of the distance of his residence or sta- , the duty on which he is engaged, or other circumstance, not attend without an unreasonable delay, or serious prejudice he service.[2]

he non-return of a deposition, for which interrogatories have 1 sent, may also constitute good ground for a brief continu- , where the moving party has not been chargeable with es in having it executed or procuring its return.[3]

Absence of written or documentary evidence. The onableness of this as a ground for continuance is illustrated n English case,[4] where, in granting a postponement to enable defendant to procure a copy of a judgment of a distant tri- al, the court observe: "The absence of such a document is

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Simmons § 533; Kennedy, 67; Macomb, 35–6; O'Brien, 246; Hart, 130; DIGEST, 76. A "reasonable expectation" of procuring testimony is a "standing requisite." U. S. *v.* Duane, J. B. Wal- 8.

See Burris *v.* Wise, 2 Ark. 33; Waskern *v.* Diamond, Hempst. Hawley *v.* Stirling, 2 Cal. 470.

See Marsh *v.* Hulbert, 4 McLean, 364; Blagg *v.* Phœnix Ins. Co., ashington, 5; Martin *v.* Anderson, 21 Ga. 301; Vaiden *v.* Abney, An. 57; Hogan *v.* Burleson, 25 Texas, 35; Miles *v.* Danforth, 32 59. In the last case the motion was granted, though it appeared he commissioner had not yet met the witnesses; it being held that latter were volunteer soldiers in active service, the moving party not chargeable with laches in not procuring the deposition to be otly taken.

Mackenzie *v.* Hudson, 1 Dow. & Ry. 159.

equivalent to the absence of a witness." In a military case, the occasion for moving for a continuance on this ground would most frequently arise where it was desired to obtain, for use in evidence, a certified copy, which could not be made and forwarded without some delay, of a record of trial, or other record or official document on file in the War or Treasury Department, or other public depository of the United States or a State. The court, before granting the motion, should be satisfied that the written evidence is material to the issue, that the party has not, by neglecting at a previous time to procure the original or a copy, forfeited his claim to the postponement sought, and that the writing can be procured without an unreasonable delay. Where the record or paper is of a simple character, an admission by the opposite party as to its existence and contents may sometimes well be accepted as doing away with the occasion for a continuance.

Other grounds. Other recognized grounds for the granting of continuances are such as—the sickness of the accused as established by the proper medical evidence;[1] the temporary illness of the judge advocate;[2] the death, illness or absence of the counsel for the defence, in an important case, where considerable time is required to enable the accused to supply his place;[3] the serious indisposition (shown by medical testimony) of a material witness occurring pending his examination or when he is about to be

1. Wharton, C. P. & P. § 597; Simmons § 535; Kennedy, 45; Griffiths, 29; Clode, M. L., 136; Maltby, 64; Macomb, 36; O'Brien, 247; De Hart, 131. The fact of the illness may be presented by the judge advocate, the counsel for the accused, or the accused himself if able to come into court.

2. See O'Brien, 247. In the event, however, of a merely temporary indisposition of the judge advocate or the accused, the court will ordinarily itself *adjourn* for a brief period, without any motion for a continuance being made. And where the illness seems likely to be protracted the court may prefer to adjourn and report the fact to the Commander rather than to allow a continuance moved by a party. See *post*—"Continuance as distinguished from Adjournment."

3. "It would be contrary to natural justice that a party should be compelled to have his cause tried when the attorney who has all along had the management thereof is prevented by sickness from attending trial." Hayley *v.* Grant, Sayer, 63. And see R. I. *v.* Mass., 11 Pet 229; Schultz *v.* Moore, 1 McLean. 334; Hunter *v.* Fairfax, 3 Dall 305; Hill *v.* Clark, 51 Ga. 122; Rossett *v.* Gardner, 3 W. Va. 5 Marrero *v.* Nunez, 3 La. An. 54.

called upon to testify.[1] So, a reasonable continuance may properly be granted the accused to enable him to procure counsel at the outset of the proceedings where he has not yet had a sufficient opportunity to do so.[2] It is also sometimes "reasonable cause" for a continuance that the accused, having been brought to trial presently upon his arrest or upon the service of the charges, has not had time to prepare his plea or defence;[3] or that a material amendment has been made in the charges or an additional charge has been introduced which he has not had sufficient time to examine or answer prior to the arraignment;[4] or that the case is one presenting grave questions of law or other unusual difficulties requiring extended study and preparation.[5] A further ground may be the pendency of other proceedings, in a similar or the same case, before another court-martial or a civil court; on account of which a continuance may properly be asked and granted, either because these proceedings will probably so illustrate and facilitate the investigation on the proposed trial as to make it desirable to suspend the same till such proceedings are terminated; or because a due respect for the civil authority requires that such suspension should be had. Thus in Capt. Howe's case,[6] the trial by court-martial was, (as

1. Simmons § 533.

2. Simmons § 475, 536. DIGEST, 77; G. C. M. O. 25 of 1875. So, it may be proper to accord a brief continuance to a party desiring to procure an interpreter, clerk, or stenographer, where the necessity or expediency of employing such assistance is sufficiently made to appear.

3. Kilmarnock's Case, Foster, 2; State *v.* Lewis, 1 Bay, 1.

4. Hough, 31; Id., (P.) 667; Simmons § 418; Griffiths, 62; O'Brien, 150; DIGEST, 77. A further ground may consist in the fact that a material amendment is allowed by the court to be made in the charges after arraignment or pending the trial. DIGEST, 77, 155. Important unexpected testimony given on the trial, which could not reasonably have been anticipated, may also furnish ground for a continuance. DIGEST, 83.

5. And so where, from some unforeseen accident or casualty, the party has been deprived of the opportunity to prepare for trial. See Torrey . Morehouse, 1 Johns. Cas. 242; Nixen *v.* Hallett, 2 Id. 218; Farr *v.* McDowell, 1 Bay, 31.

6. VI Opins. At. Gen., 506. To the grounds here enumerated may be added one other, recognized in the civil practice and which may under some circumstances be applicable to a military case, viz: the prevalence of a state of public excitement and prejudice precluding for the time an impartial trial. See Rex *v.* Gray, 1 Bur. 510; Com. *v.* Dunham, Thach. 516; Jim *v.* State, 15 Ga. 535; Nelson *v.* State, 2 Swan, 483.

above mentioned,) suspended for two years, (not indeed by a formal continuance but upon the same principle,) for the reason that the accused had already been arrested, indicted, and held to bail by the civil authorities on account of the same act which formed the subject of the military charge, and for the purpose of awaiting the result of the criminal proceedings.

Trial of the Issue on an Application for Continuance. Upon an application for a continuance under the Article, all facts and circumstances relied upon by the party to sustain his motion should properly be laid before the court; and, where desirable he may fortify his statement or affidavit by the statements and affidavits of other persons.[1] He may annex to, or incorporate or present with his own statement such orders, communications, or other written evidence as may be apposite. To support his motion, he may also introduce witnesses, (to be sworn by the judge advocate;) and the opposite party, if he *contests* the application may offer counter affidavits and rebutting witnesses; and both parties may make argument.[2] For in such a case a regular and legal *issue* is joined, and, (although the proceedings, being preliminary merely, should be as brief as practicable,) an issue to be duly tried and determined. But where the *accused* applies for a continuance upon a recognized ground, and furnishes a satisfactory statement or sufficient evidence to warrant it, his application, except perhaps as to the extent of time asked for, will not often be contested by the judge advocate.

It may be added that, in general, the facts set forth in an affidavit for a continuance, if frankly and fully stated, are to be taken to be *prima facie* true, and, if not disputed by the opposite party, are to be acted upon as substantially true by the court.[3]

Continuance as distinguished from Adjournment. In conclusion may be noticed the distinction between *continuances*, which are granted to a party upon his application therefor under the authority of the Article of war, and *adjournments*, which are properly brief intermissions of its business taken by the court itself of its own accord or as its own act. An adjournment may

1. See King *v.* Siberil, 1 Ken. 356; Maltby, 64.

2. See Simmons § 533. But see DIGEST, 76, note 1.

3. See Wick *v.* Weber, 64 Ills. 167; Quincy Whig Co. *v.* Tillson, 67 Id. 351.

sometimes accomplish the purpose of a continuance and render one unnecessary. Thus, for some such object, not likely to involve a long delay, as to enable the accused to procure counsel, or the judge advocate a clerk; to secure the presence of a witness who is *en route* and expected presently; to give time for the recovery of a party, counsel, witness, or member, who is temporarily ill, &c.—a voluntary adjournment by the court for a day, or for a few days, or from day to day for a brief period, will often be adequate without a resort to an application for the formal continuance contemplated by the Article. Even a *recess* taken by the court for a part of a day will sometimes be sufficient.

Extent of authority to adjourn. An adjournment, like a continuance, is not to be resorted to merely for the convenience of the members.[1] It should be taken to some particular day; to adjourn subject to the call of the president would be irregular; to adjourn subject to the call of the judge advocate would be quite without the sanction of military usage.[2] In war, or when otherwise specially prompt action is required, the court may adjourn to the quarters of a sick member and there hold a session,[3] or to the quarters of a sick witness for the purpose of taking his testimony.[4] In a case of necessity a court-martial may even adjourn to a different station or locality, but such an adjournment should, regularly, be subsequently ratified by the Commander. An adjournment *sine die* or "without day" has no legal significance, and no more effect than a simple adjournment; a court-martial being a creature of orders and having, as has heretofore been noticed,[5] no power to dissolve itself or terminate its own existence.[6]

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1. "While courts have the unquestioned right to adjourn from time to time in the interests of the public service, and while they are the judges of what the public service may require, yet an adjournment prompted by the caprice, or made to suit the convenience of the members or a part of them, involves the offence of disobedience of orders on the part of those members who vote for it." G. C. M. O. 161, Dept. of Dakota, 1882. (Gen. Terry.)

2. "The future meetings of the court should not have been left to the discretion of the judge advocate." G. C. M. O. 9, Dept. of Texas, 1883. (Gen. Augur.)

3. Hough, (P.) 712, 721.

4. Hough, (P.) 744; Kennedy, 45; DIGEST, 103. And note instance in G. C. M. O. 37, Dept. of the East, 1870.

5. Chapter V.

6. DIGEST, 103; G. C. M. O. 142, Dept. of the Mo., 1870.

IV. NOLLE PROSEQUI OR WITHDRAWAL.

Definition. At or before the arraignment, (or later pending the trial,) it may happen that it will be expedient for the government to enter a *nolle prosequi* as to the charge, or, where there are several charges, to one or more of the charges or specifications. The term is derived from the common law formula according to which the prosecutor comes into court and *fatetur se ulterius nolle prosequi.* It is thus a declaration of record on the part of the prosecution that it withdraws the charge or specification from the investigation and will not pursue the same further at the present trial.

Authority and occasion for. As has already been indicated, the *court* has no authority *of its own motion* to withdraw a charge, nor has the *judge advocate*, in his capacity of prosecuting officer or otherwise, any such authority.[1] The authority to *nol. pros.* must be exercised by the superior who ordered the court, or must be obtained from him. The principal grounds for this proceeding will be—the fact that the charge, &c., is discovered to be substantially defective and insufficient in law; that it is ascertained, (which indeed may not be done till the trial is quite or nearly concluded,) that the allegations cannot be proved, or that the testimony available is not sufficient to sustain them; that the criminality of one of the accused, where there are several, cannot be established; that it is proposed to use one of the accused as a witness, &c.[2] As will be noticed in the next Chapter, this proceeding is the proper one, where a valid pléa of pardon is interposed by the accused. The entry of a *nolle prosequi* is

1. Chapters X and XIII.

2. In G. O. 64, Dept. of the Cumberland, 1867, it was properly held to be "no ground for a *nol. pros.*," that to proceed with the trial would prejudice the interests of the service in detaining the accused, and an officer present as a witness, from important duties. In G. O. 75, Dept. of the South, where the judge advocate, with the assent of the court, entered a *nol. pros.* to certain charges and specifications, on the ground that three of the most material witnesses had absented themselves without authority from the court-room and could not be found, and the remaining witnesses could not prove the case, this action was disapproved by Gen. Terry, and it was remarked that—"the reason assigned, unless the court was satisfied that every proper effort had been made to procure such evidence, ought to have been considered by the court as insufficient."

ıes also resorted to in anticipation of a motion to quash, such a motion has been made and because of it.[1]

:t. A withdrawal of a charge or specification is not *per* 'alent to an acquittal, or to a grant of pardon, and cannot leaded. It simply removes from the pending case the ar charge, &c., without prejudice to its being subsequently l in its original or a revised form. In the criminal proceeed, a *nolle prosequi* cannot in general be entered, after ment and plea, without the consent of the accused, who, in v of the law, is deemed, in the event of such action, to be to a verdict which he may plead in bar of a second trial; if the entry is made against his consent, it is held to be ɔunt to an acquittal.[2] But this doctrine cannot properly ied to cases before courts-martial, where the proceedings ducted under military orders, and where, when charges ıdrawn from prosecution, they are so withdrawn by the ɔr, what is equivalent, the sanction,) of the official superior eated the court and directed the trial—an order which ıe judge advocate, the accused and the court alike.[3]

:tice. In the military practice, the *nolle prosequi* has been resorted to at the outset of a trial and where a special motion to strike out has been allowed by the court. The ɔnable charge or specification being thus formally with- the trial proceeds on the other charges and specifications. *later* stage of the trial, it is found that a charge or speci- cannot be sustained, or it is determined for other reason

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[1] State *v.* Buchanan, 1 Ire. 59, where a motion having been quash, the prosecuting attorney *nol. prossed* as to a defective etaining the rest of the indictment. As to the Motion to quash out, see Chapter XVI.

[2] 1 Bishop, C. P. § 1394; Wharton, C. P. & P. § 447; U. S. *v.* ker, 2 McLean, 114; U. S. *v.* Farring, 4 Cranch C. 465; Com. , 20 Pick. 366; Com. *v.* Scott, 121 Mass. 33; Mount *v.* State, , 301; Reynolds *v.* State, 3 Kelly, 53.

[3] such an order the military commander represents the govern- . *e.* the President; and, as observed by Atty. Gen. Wirt, (V 729,) "there can be no doubt of the power of the President to *nolle prosequi* in any stage of a criminal proceeding in the name United States;"—a statement of the law especially applicable to y cases. To the same effect see U. S. *v.* Corrie, Brunner, 686. *post* as to the *practice.*

that the same shall not be pursued, while it will be legal to enter a *nol. pros.* thereto, it will be the preferable course, as well as most just to the accused, not to do so, but to allow the accused to be formally *acquitted* thereon at the finding.[1]

1. See G. O. 64, Dept. of the Cumberland, 1867; G. C. M. O. 79, Dept. of the Platte, 1877; Do. 6, Dept. of Cal., 1872.

CHAPTER XVI.

PLEAS AND MOTIONS.

Answer to the Arraignment. The accused, upon being raigned, may, (where he does not stand mute, or ask a continuice before pleading,) answer to the arraignment in several forms. e may proceed at once to plead 'guilty' or 'not guilty' to the iarge and specifications, (or 'guilty' to some and 'not guilty' others;) or he may interpose, by way of special plea or mon, an objection or objections to his being tried at all; or he ay similarly object to being tried on some particular charge charges, specification or specifications, while pleading the neral issue as to the rest. He is not indeed limited to one ecial plea or motion, but may offer such number as the law facts may justify, before—in the event of their disallowance—sorting, as he may then do, to the plea of 'guilty' or 'not uilty.'[1]

Preliminary Objections. We have already seen that at an rlier stage, *viz.* prior to the swearing of the court, and at the int at which challenges are usually offered, the accused, being esent, may raise any objection properly going to the legal istence of the court,—as that it has not been legally constited or composed; or to its authority to proceed with the trial,—that it is without jurisdiction of the person or the offence. ich objections are indeed good at any time; they may therefore taken at the stage now reached, *viz.* upon the arraignment. ie objection, however, that the court is an illegal body, whose oceedings must be void *ab initio*, is a radical defect which is st appropriately raised and determined at the earliest stage, l the grounds for such objection have already been considered the Chapters on the Constitution and Composition of General irts-Martial. The plea of want of jurisdiction, on the other

[1] See 4 Black. Com., 338; Tytler, 242; Maltby, 60; O'Brien, 250.

hand, being based mainly upon the descriptions and averme of the charges, which are not formally before the court till t arraignment, may properly be, and in practice generally is, served till this time.

Division of the Subject. The subject, therefore, of *answer to the arraignment* may be presented under the follow heads, indicating the different forms in which such answer n most fitly be made:—I. Plea to the Jurisdiction; II. Motion quash or strike out; III. Special pleas in bar; IV. Plea of Gu or Not Guilty.

I. PLEA TO THE JURISDICTION.

A Plea Legally Entertained. That this plea, (whic to the effect either that the person of the accused, or the offe charged, is not within the jurisdiction of the court,) is one wh may legally be made and entertained, is now fully settled in military law and practice. In other words a court-martia authorized to pass upon the question of its own authority to ceed to *try* under the convening order.[1] Its conclusion in upon such question is not final; and if, having determined it has not jurisdiction, it is thereupon *ordered* by the conve officer to take cognizance of the case, it will be its dut comply.

The Subject Elsewhere Considered. The subject of plea, however, need not here be dwelt upon. In Chapter V under the title of the Jurisdiction of General Courts-Mar have already been fully exhibited the occasions and grounds such plea in general, and in Chapter XXII are indicated special grounds upon which the same may be offered upon a before an Inferior Court. The situations and circumsta therefore which justify this plea need not here be reiterated.

II. MOTION TO QUASH OR STRIKE OUT.

Its Nature and Scope. By means of this convenient effective motion on the part of the accused,[2] may be raised

1. That a court-martial is empowered to pass upon the questi its own legal existence or original authority, see Tytler, 143; V O At. Gen., 707.

2. It may also be made by the *prosecution* with regard to a s *plea* interposed by the accused, claimed to be insufficient in for substance.

ecided in a summary manner all the objections which in the vil practice may be taken by the plea to the jurisdiction, the emurrer, the plea in abatement, or the motion in arrest of judgent. It is in effect a species of informal and commonly oral lea,[1] much availed of in the criminal courts, as a ready and fectual means of disposing of objections in general to the indictent, by effacing the same, or a separate count, from the record. s remarked in an adjudged case,[2] the motion to quash, as comared with the other forms of procedure above mentioned, "is a ore easy and equally effectual mode of getting at the whole atter: everything may be heard upon it." This motion, ough it has not received from military writers[3] the attention which it is entitled, is not unfrequently resorted to in the odern military practice where it is commonly distinguished as e *motion to strike out.* In this practice, in which the demurrer as ich is not appropriate, and the plea in abatement, being dilatory d captious in its character, is rarely employed, and in which also e motion in arrest of judgment is unknown, the motion under nsideration, from its simplicity, directness, and efficiency, is emed to have a peculiar aptness and value.

Form of the Motion. There is no prescribed form for this otion, which may either be oral or in writing.[4] It should not, wever, be made in general terms, but its precise ground or ounds should be distinctly specified.[5] Otherwise indeed the urt may decline to entertain it.

At what stage to be Interposed. As has already been incated, this motion is one to be made upon the arraignment and

1. See 1 Bishop, C. P. § 761.

2. Nichols *v.* State, 2 Halst. 539. And see State *v.* Wishon, 15 Mo. 3; State *v.* Dayton, 3 Zabr. 49.

3. Simmons indeed, (§ 568,) remarks in substance that the accused ay offer, by way of *plea,* an objection to the charge on account of a ant of specific allegation as to some material matter. And see, as peating, Macomb, 37 ; De Hart, 145–6; O'Brien, 249. It may be served that there is no subject in regard to which military writers in neral are more incomplete and uninstructive than that of Pleas and otions ; the matter of pleas proper being repeatedly found confused on e one hand with that of motions and on the other hand with that of fences.

4. In practice, it is commonly oral. See *ante.*

5. See State *v.* Maurier, 7 Iowa, 408.

before a plea to the general issue. But as its effect, if gr is to save time and simplify the proceedings, a criminal will always permit an accused, who has pleaded not guil withdraw his plea for the purpose of interposing this mo and a court-martial will properly do the same.

Occasion and Use of the Motion. "Whenever," Bishop,[2] "an indictment cannot be proceeded with advan ously to public justice, or without doing a wrong to the de ant," it may, on proper motion, be quashed. As in the ord criminal procedure, so in that of courts-martial, this motion and properly will in general be made, with regard to a cha specification, on one, (or more,) of the grounds following, that the person described or offence charged is not withi jurisdiction of the court; that the charge does not set forth sufficient to constitute the alleged offence; or that, for a observance in the pleading of the rule of certainty or some or others of the rules heretofore laid down as governin framing of charges, the accused is actually prevented from m a proper plea or defence. As in the civil practice, the gro the motion most frequently relied upon will be that the or specification does not set forth the intended offence, legal offence; this motion being really, in its commonest cation, a substitute for the demurrer.[3] The motion, howe not unfrequently made on account of the serious indefinite the substance of a specification.[4]

Addressed to the Discretion of the Court. This being of a summary and aggressive character, in the natu

1. Nichols *v.* State, 2 Halst. 539.

2. 1 C. P. § 758.

3. See State *v.* Robinson, 9 Foster, 274; Thomasson *v.* State, 499; Com. *v.* Chapman, 11 Cush. 422.

4. Compare State *v.* Rutherford, 13 Texas, 24, where a cou quashed on motion because—"so vague, uncertain, and indefini he (the accused) is unable to understand what he is called upon fend." And, to a similar effect, see Rex *v.* Heffer, 1 Ry. & M. It may be added here that where there are in the case two against the accused in substantially the same form and for th offence, whereby, without material advantage accruing to the cution, the defence must be embarrassed, a motion to strike of them may properly be made and allowed. Compare State dale, 2 Dev. & Bat. 100.

l upon the indictment, it is agreed by the authorities that it n all cases wholly *within the discretion of the court* whether or : it will allow a proceeding the effect of which is to eliminate entire basis and material of the prosecution or an important t of it.[1] While in a clear case the motion will generally be nted, in a case of any doubt the court will commonly prefer to accede to so abrupt a method but to leave the accused to e advantage of the alleged defect on the general issue.[2] A rt-martial will also the more hesitate where the charge moved e struck out has been preferred or revised by high military hority, and there is thus an unusually strong presumption in or of its completeness and sufficiency in law. The test which civil courts usually apply to an indictment or count moved be quashed is the question whether it will support a legal gment: if it will, the motion is not granted.[3] With a court-tial the corresponding test would be whether a finding of lty upon the charge or specification which is the subject of motion would convict the accused of a legal offence for which tence could properly be adjudged, or of one the trial of which ld be pleaded in bar of a second trial for the same offence.[4] : granting of the motion being discretionary with the court, a sal to allow it cannot affect the legality of the proceedings.[5]

ot in General to be Granted except for a Defect Substance. Although motions to quash have been allowed he civil practice for "gross deficiency in the formal requi-;,"[6] the better general rule is that to warrant the granting of motion the defect must be of a substantial character and not

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Nothing is better settled than that the court is not *bound* to quash ndictment before trial. State *v.* Burke, 38 Maine, 574. "It is a er of discretion whether an indictment shall be quashed in any case: not *ex debito justitiæ*. In an important and doubtful case I would do it." Hornblower C. J., in State *v.* Hageman, 1 Green, 323.

See 1 Bishop, C. P. § 768.

Hawkins, c. 25, s. 146; State *v.* Dayton, 3 Zabr. 49; State *v.* lwin, 1 Dev. & Bat. 195; Com. *v.* Eastman, 1 Cush. 189; U. S. *v.* l, 2 Curtis, 265.

Thus a motion to strike out a charge of "conduct unbecoming an er or a gentleman," or other specific charge, should not be granted e the specification will at least support a valid finding of "conduct e prejudice of good order and military discipline."

State *v.* Putnam, 38 Me. 297; Com. *v.* Eastman, 1 Cush. 189.

1 Chitty, C. L., 302. And see U. S. *v.* Crittenden, Hemphill, 61.

one of form merely.[1] So, in a military case, the court w properly disallow a motion to strike out a specification on acco of a mere defect of form, (except where of an unusually agg vated character,) or even for a slight substantial defect wher can be at once or presently remedied by an amendment on t part of the judge advocate.

Admission of Evidence in Support of the Moti This being a summary proceeding, it is the general rule th must be based upon a defect appearing on the face of the pl ing. This rule, however, is held not to preclude the court fr aiding its discretion by taking into consideration extrinsic f admitted by the prosecution or exhibited in evidence by affida In military proceedings there can in general be no objectio thus showing some fact of a simple character essential to f sustain the motion and which will enable the court at onc determine it. But facts which are in issue between the par cannot be shown in this connection, and if proof of such f is necessary to sustain the motion, the same will properly denied, and the accused be left to his defence.

Proceeding upon the Granting of the Motion. T court, instead of allowing the motion in terms, may, as alre indicated, permit the judge advocate, if he desires it, to am the defective pleading, provided an adequate amendment ca the time be made. But if the motion is specifically granted, a it relates to the only charge or all the charges in the case, t court will communicate, through its president, to the convening authority, the action taken, and await his orders; meanwhile thought desirable, proceeding with any other case that may ready for trial. If the motion as granted has related to but or a portion of two or more charges or specifications, the c will proceed with those left unassailed precisely as if they w the only charges originally in the case; their validity not b

1. State *v.* Dayton, 3 Zabr. 53; Bell *v.* Com., 8 Grat. 603. statutes of some of the States contain express provisions to the that indictments shall not be quashed for defects not prejudicing substantial rights of the defendant upon the merits. See, for exa the Indiana statute referred to in Dukes *v.* State, 11 Ind. 560.

2. See 1 Bishop, C. P. § 763.

ed by the striking out of the other or others.[1] If, however, 'emaining charges or specifications be of a comparatively portant character, the court may in its discretion communi- with the convening authority before proceeding to try the

ıe commander, on receiving the report of the court, may, : disapproves its action, order it positively to proceed to try :harges,[2] or require it to reconsider such action in the same ner as upon a final judgment. Or, whether disapproving or ırring, he may direct the court to proceed with the trial ı the remaining charges or specifications; or, if all the ges, &c., be eliminated, or those left be such as not to make ırth while to pursue them alone, he may direct the judge cate to abandon the prosecution altogether. Or he may mit to the court new or amended charges, to be tried those of the former set which remain, or, where none re- , to form the basis of a new prosecution.[3] In either of these , whether the charges be altogether new or amended, the edings should be commenced *de novo;* the accused being offered the opportunity of challenge, and the court being ırn.[4]

State *v.* Woodward, 21 Mo. 266; Simmons § 568. But quashing dictment as to one of several *joint* defendants, and upon his n, quashes it as to all. 5 Bac. Abr. 96; People *v.* Eckford, · 535.

See an early instance of such an order in G. O. of Feb. 22, 1822.

In the same manner as, after an indictment has been quashed, "a nd more regular one may be preferred." 1 Chitty, C. L., 304.

Motion to sever. Here may be noticed a motion which will regu- e made at the arraignment, *viz.* the motion by one of two or more ccused to be allowed to "sever," *i. e.* to be tried separately from her or others. Except where the essence of the charge is combi- between the parties, (as in mutiny,) the motion may properly be d for good cause shown. (See Manual, 496; Pratt, 68; English of Procedure, 15.) The more common grounds of motions for nce are that the mover desires to avail himself on his trial of the ony of one or more of his co-accused, or of the testimony of the one, or that the defences of the other accused are antagonistic to n, or that the evidence as to them will in some manner prejudice ence. This motion has most rarely been presented to the court military practice. It was made by several of the accused on the y military commission of Milligan, Bowles, and others, in Indiana, 4, and by McRae, on the trial, by a similar tribunal, of McRae, and others, in North Carolina, in 1867, but in each case was over-

III. SPECIAL PLEAS IN BAR.

Under this Title will be considered, as special pleas in bar trial in military cases—The Plea of the Statute of Limitatio The Plea of Former Trial for the same offence; and the Plea Pardon. To these will be added a reference to certain Inadm sible Special Pleas.

THE PLEA OF THE STATUTE OF LIMITATIONS.

As pointed out in Chapter VIII, the objection, in a milit case, that the statutory limitation of prosecution has taken eff is, by the present weight of authority, not one going to the ju diction of the court, but *matter of defence* only. As such, wh it may be taken advantage of upon the general issue,[1] it is pre ably disposed of at the outset of the proceedings by the spe plea now to be considered.

The Statute. The military statute of limitations is the 10 of the Articles of war, which is expressed as follows:—"*No per shall be liable to be tried and punished by a general court-mar for any offense which appears to have been committed more th two years before the issuing of the order for such trial, unless, reason of having absented himself, or of some other manifest i pediment, he shall not have been amenable to justice within t period.*"

The original of this provision in our law was Article 88 of t code of 1806. The present is substantially identical with t earlier form.

The general rule of limitation in the British law[2] is, that person shall be tried for an offence committed "more than th years before the date at which his trial begins." The beginni of the actual trial is a better date than that of the issuing of t order for the court fixed by our Article, since the latter allows an indefinite interval between the date of the order and tha a trial had thereunder without the right of the government

ruled. Where the *prosecution* desires to use one of two or more j accused as a witness against another or others, the practice is no move to sever but to enter a *nol. pros.* as to such one.

1. 1 Bishop, C. P. § 799; Wharton, C. P. & P. § 317.
2. Army Act § 161.

osecute being affected.[1] The *date of the arraignment* would obably be the best that could be selected from which to reckon ck to the commission of the offence.[2]

Scope of the Limitation—Application to Desertion. is held by the great weight of authority that the statute apes equally and alike to all military offences. It is only in ard to its application to cases of *desertion* that there has ever en any question. That it includes desertion has been held by : Judge Advocates General[3] and the Attorneys General[4] in eated rulings. The Attorneys General, though their views to the time from which the limitation begins to run in such es have, as will presently be indicated, undergone a modification, have never departed from the original conclusion that this ence was not excepted from the operation of the statute.

As to the Courts—the affirmative of the question was mainned by Choate J., U. S. District Judge for the Southern Disct of New York, in 1880, in Davison's Case,[5] in the following inted terms:—"It is insisted on the part of the respondent that 'absence' is here meant absence from the post of duty and it this article has no application to desertions. It is certainly tartling proposition that there is no limitation at all upon prositions for the offence of desertion; that one who has once been leserter is subject during the whole of his natural life to be ought before a military court and tried and punished for this ence even in extreme old age. Yet this is seriously contended the learned counsel for the respondent. The statute does not uire, nor in my opinion admit of so strict and narrow a conuction. There is nothing in this article itself clearly indiing that it does not extend to every military offence. As it is : only article limiting the time of prosecutions the presumpn is very strong that it extends to every military offence; for,

. Captain Howe's Case, VI Opins. At. Gen., 512. And see Id., ; G. C. M. O. 85, Dept. of the Mo., 1869.

. This is the date fixed in the Bill to amend the 103d Article, which sed the Senate in 1880.

. DIGEST, 85; Annual Reports of Judge Advocate General to Secry of War for 1877, 1878, 1879, and 1880.

. XIII Opins., 462; XIV Id., 265; XV Id., 152; XVI Id., 170, . [Opinions of Attys. Gen. Williams, Taft and Devens, and Sol. . Bristow.]

In re Davison, 4 Fed. Rep. 507.

with the single exception of the crime of murder, the almost universal policy of the criminal law is to prescribe a term within which the offender shall be brought to trial."

In the same case, as heard in the U. S. Circuit Court on appeal, in 1884,[1] Wallace J., though not directly passing upon the point, is deemed to indicate quite clearly his opinion that the offence of desertion is within the general rule of the Article.

Meantime, in White's Case,[2] in 1883, the U. S. Circuit Court for the Ninth Circuit, had expressed, *obiter*, its concurrence in the views of Choate J., as to the operation of the statute. "Were the question properly before us," says Judge Sawyer, "we should have no difficulty in reaching the same conclusion as that attained in Davison's Case," &c.

To these opinions may be added that of the Committee on Military Affairs of the Senate, which, in recommending the passage of an amended Article, more definite in its terms than the present form and extending the period of the limitation in cases of desertion, has endorsed in decided language the conclusion of the Attorneys General and Judge Advocate General.[3]

These conclusions, however, have not heretofore had the support of the War Department. At an early period the theory seems to have been adopted in that Department and by army commanders that, by the term "unless by reason of having absented himself," employed in the Article,[4] cases of desertion were excluded from its operation, and that therefore *no limitation to prosecutions for desertion was prescribed by the code.* This view, though in a few instances departed from, or not followed, in Orders both of the War Department and of the military departments,[5] was adhered to and acted upon in the great majority of cases down to 1877, when, the question being under special consideration, the following decision was made on the subject by the Secretary of War: "War Department, January 20, 1877. I decide that the old interpretation of the late 88th, now 103d, of the Rules and Articles of War, under which a deserter might be tried by court-martial without regard to the length of his absence notwithstanding

1. 21 Fed. Rep. 618.
2. *In re* White, 9 Sawyer, 49.
3. Report, No. 42, Senate, 46th Cong., 2d Sess.
4. See the construction of this term as given *post.*
5. As in G. O. 17 of 1834; G. C. M. O. 63 of 1874; G. O. 52, D of the South, 1870; G. C. M. O. 11, Div. Pacific & Dept. of Cal., 18[illegible]

the limitation clause in the said Article, shall continue in force. J. D. Cameron, Secretary of War."

This decision was never published in General Orders. It is not known, however, to have been withdrawn and is supposed to be still, (1886,) maintained.[1]

The result is that, at the present time, on the question of the application of the 103d Article to the offence of desertion, the affirmative, so far as has been made known, is held by the law officers of the Government and the U. S. Courts, and the negative, apparently, by the War Department and, in concurrence with or deference to its views, by most or all of the department commanders.[2] Courts-martial, while not *bound* by such views, have also in general deferred to the same, and have commonly overruled the special plea of the statute when offered, as it not unfrequently is, by alleged deserters upon arraignment.[3]

When the Limitation begins to run in Cases of Desertion. Upon the construction, however, that the Article applies to desertion, the question as to when the limitation begins to run in bar of prosecution for that offence has been much discussed. Early in the recent war, it was held by Judge Advocate General Holt, in reviewing the matter of the proper interpretation of the Article, that the two years should be considered as commencing with the day on which the deserter originally absented himself without authority and with the *animus* characterizing the offence; and this view was at first apparently fully adopted by the Attorney General.[4] In a later opinion, however, he took the ground, based in part upon the definition of the offence by foreign writers,[5] that desertion should be regarded as a *continu-*

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1. It seems, however, to have admitted of some variation. See G. O. 5, Dept. of Cal., 1884.

2. It was held otherwise, however, by the Dept. Commander, Dept. of Cal., in 1883, in view of the decision, at San Francisco, of the U. S. Circuit Court in White's Case. See G. C. M. O. 66, 70, 118, Dept. of Cal., 1883. And compare Do. 19, Dept. of the Mo., 1883.

3. The plea, however, has been sustained in several recent cases. See G. C. M. O. 75, Div. Pacific & Dept. of Cal., 1879; Do. 15, Id., 1880; Do. 12, Dept. of the Columbia, 1884; Do. 86, Dept. of Dakota, 1884.

4. XIV Opins., 265.

5. See XV Opins., 159. And compare Du Mesquil, Dictionaire de la Justice Militaire—Desertion.

ing offence, and that the period of the limitation should therefor be viewed as beginning not till the end of the term for whic the soldier has enlisted,—unless indeed he be apprehended c surrender himself prior to the end of such term, in which ca the time would run from the date of apprehension or surrende But in Davison's Case, in the U. S. District Court,[1] this refin ment was rejected, and the view of the Judge Advocate Gener adopted; Judge Choate well observing that "the whole effect the limitation" cannot properly "be taken away on the theo that the desertion may be considered for some purposes to be continuing offence," but that the offence is to be regarded "*complete for the purpose of this* (the 103d) *Article*" on and fro the day of the original unauthorized absenting of himself by th soldier. In the same case in the Circuit Court,[2] Judge Wallac while viewing the offence as "a continuous one," declines t pass upon the question when the limitation commences to run but holds, with the same Court in White's Case,[3] that this is a question for the *court-martial* to determine; the limitation being held, (as has been set forth in Chapter VIII,) to constitute a "matter of defense" to be pleaded, or otherwise taken advantage of on the military trial. In White's Case, the Court, as already noticed, intimates its full concurrence in the views of Judge Choate "as to the effect of the statute," and may therefore be considered as adopting his view that in applying the limitation to desertion, that offence is not to be treated as a "continuing" one.

Desertion as a continuing offence. That the theory—it may here be remarked—that desertion is a "continuing offence" in law, is more fanciful than substantial, will, it is believed, be perceived on comparing it with the true continuing offences known to the common law, with which it will be found to have little in common. The principle, for example, applicable to the maintaining of a nuisance, the most familiar of the technical continuing offences, that an acquittal or conviction of the offence as committed on a certain day is "no bar to an indictment for continuing the nuisance on a subsequent day,"[4] can have no

1. *In re* Davison, 4 Fed. Rep. 507.
2. 21 Fed. Rep. 618.
3. 9 Sawyer, 49.
4. Beckwith *v.* Griswold, 29 Barb. 294.

application to the military offence of desertion. The error, indeed, for such it is regarded, of classing desertion with the continuing offences, or even as a *quasi* continuing offence, has arisen, as it is considered by the author, from a misapprehension of the nature and definition of desertion itself, and from confusing it with the lesser offence of absence-without-leave contained within it. Desertion consists not merely in an unauthorized act, but in such an act accompanied at the moment of its commission by a certain specific intent. That a soldier has absented himself without authority does not make him a deserter: to be such he must have absented himself not only without authority but with an intention not to return. Whenever a desertion is committed it involves of course the minor offence of an absenting without authority, and the unauthorized absence thus commenced *continues* till the offender is arrested or surrenders himself. Thus the absence without authority, ('without leave,' as it is commonly characterized,) may be viewed as a *quasi* "continuing offence," being committed anew on every day of the period of absence. But the desertion is an offence consummated and concluded on the day on which the peculiar *animus* of the offence is entertained and executed, *viz.* the day of the original unauthorized absenting with the deliberate purpose of abandoning the service. On that day the specific military crime is in law complete: thereafter, though the illegal absence always continues, the offender is, properly speaking, a deserter only in the colloquial sense that a thief is a thief till he is caught and tried. Thus, in brief, the notion that desertion is a "continuing offence" is believed to be due simply to a confounding of the principal and higher offence with the minor offence included within it;[1] the latter, (relatively speaking,) being the "continuing" offence, not the former.

If desertion is not properly a continuing offence in law, or rather unless it is such a continuing offence, the view of the Judge Advocate General, originally supported by the Attorney General, and adopted by Judge Choate, that the limitation in all cases begins to run from the day of the first absenting of him-

1. That every desertion includes an absence-without-leave; that soldiers charged with desertion not unfrequently plead guilty of absence-without-leave only, and may be, and not unfrequently are, convicted of the lesser offence under a charge of the greater—is law and practice too familiar to the military mind to require to be dwelt upon.

self by the soldier without authority and with the *animus non revertendi*, as being the day of the actual commission and consummation of the desertion,—is necessarily the correct one under the terms of the Article. But while this is also the view of the author, he fully appreciates the desirableness, in consideration of the contrariety of opinion on the subject, of some legislation, similar in purpose to that heretofore initiated, which shall so clearly define the law of limitations in military cases as to preclude any further controversy as to its construction.

Construction of the Proviso of the Article—Absence—Manifest impediment. The effect of the proviso or exception with which the Article concludes, *viz.*—"*unless by reason of having absented himself, or of some other manifest impediment, he shall not have been amenable to justice within that period*,"—has been quite fully considered in the opinions of the Attorneys General and Judge Advocate General, and in Davison's Case above cited.

"Having absented himself." As to this term, it was originally held by the Judge Advocate General that it was to be construed with reference to the limits of the jurisdiction in general of military courts, and that, as these limits were the limits of the federal domain, the *absence* here contemplated meant absence from the United States or commorancy in a foreign country. This view was somewhat qualified by the Attorney General who held that this absence "meant absence from the reach or jurisdiction of the military authorities," or absence "where the military authorities by reasonable diligence could not make" the party "amenable to justice."[1] Judge Choate, however, in the case of Davison, again adopts the ruling of the Judge Advocate General. "The language," he says, "of this statute of limitations must be construed with reference to the use of similar language in other statutes of limitation. The 'absence' here intended is obviously from the context such an absence as interposes an impediment to the bringing of the offender to trial and punishment. It means absence from the jurisdiction of military courts; that is, absence from the United States."[2]

1. XIV Opins., 267.
2. In the Bill to amend the Article, which passed the Senate in 188 the proviso in regard to absence is—"unless he may meanwhile ha absented himself from the United States."

"Other manifest impediment." As to the significance of this term, there is no material difference of view among the authorities. Judge Choate observes in Davison's Case:—"The other manifest impediments' referred to in the statute as being such as shall have prevented the offender from being amenable to justice, are such impediments only as operate to prevent the military court from exercising its jurisdiction over him, as for instance his being continuously a prisoner in the hands of the enemy, or of his being imprisoned under sentence of a civil court for crime and the like." The Attorney General says of "manifest impediment" that it "means something akin to absence—want of power, or physical inability to bring the party charged to trial."[1] Incidentally it has been held that a reenlistment by a soldier, upon deserting, in another regiment of the army or in the marine corps, could not constitute an impediment but the reverse, since the soldier, by the second enlistment, placed himself the more directly within the reach and control of the military authorities.[2] It has also been held that mere concealment of evidence or identity, or other fraud practiced by the deserter, by means of which he has avoided being brought to trial within the period of limitation, is not an "impediment" in the sense of the article:[3] it is indeed the business of the Government, supplied as it is with the forces and facilities for the purpose, to follow up a deserter with such diligence as to preclude, if practicable, such a result. Laches cannot be imputed to the Government;[4] on the other hand it is stopped from claiming that because not informed of an offence it could not prosecute it.[5] It need hardly be added that a delay

1. XIV Opins., 267.

2. DIGEST, 87; XIV Opins. At. Gen., 265; G. C. M. O. 63, War Dept., 1874.

3. DIGEST, 87; XIV Opins. At. Gen., 52, 266–8.

4. U. S. *v.* Kirkpatrick, 9 Wheaton, 720; Raymond *v.* U. S., 14 Blatchford, 52.

5. See DIGEST, 87–8. In a case in G. O. 33, Dept. of the East, 1869, in which it was claimed on the part of the prosecution that as "the Government did not know of the offence early enough to bring the accused to trial within two years," there had been an impediment in the sense of the Article, the reviewing commander, Gen. McDowell, well decided—"The accused cannot be deprived of his legal right by the inattention, delay, neglect, oversight, or any other fault or failing on the part of the Government. He is not responsible for them, and cannot be made to suffer by reason of them."

to prosecute beyond the period of the limitation, caused l
fact that it was not convenient or deemed advantageous f
Government to prosecute before, can clearly not be treated
"impediment." The party, if he is to be tried, is, as ren
by Attorney General Black, *entitled* to "a trial within th
years; he cannot be deprived of that right at the option o
who have the power to try him. If," it is added, "his su
officers could create impediments which would justify a
beyond the prescribed period, the time of limitation woul
mere matter of discretion."[1]

Pleading and Procedure in view of the Articl
the statutory limitation is, according to the weight of auth
merely "matter of defence," it is not necessary, in a c
which the two years have expired, to allege in the specifi
the facts relied upon to except the case from the operation
statute. Though it affirmatively appear from the specific
in connection with the convening order, that the period
limitation has fully elapsed, the charge is yet good in la
the specification not subject to be struck out on motion.
cepting facts exist they may well be averred, but to aver
is not essential either to give jurisdiction or to comple
pleading.

The specification and order showing, (as, where the fact
they almost invariably will,) or the fact being, that the l
tion has taken effect, the accused, if he desires to raise the
tion, (for he may, according to the late rulings, *waive* it
sees fit,[2]) will (preferably) proceed to raise it by his special
orally or in writing; supporting the plea, where the essenti
does not appear from the record, by appropriate testimony.
plea being made, and proved by the record or otherwise,
devolve upon the prosecution to rebut it by evidence of
absence or other impediment as shall be sufficient to exce
case from the operation of the limitation.

Inasmuch as the objection may also be taken advant
under the *general issue*,[3] the prosecution should, in any

1. IX Opins., 184.

2. That the opinion of Atty. Gen. Wirt, (1 Opins., 383,) th
limitation could not be waived, has been in effect overruled by
decisions of the U. S. Circuit Court, see Chapter VIII.

3. See *ante*.

nless the accused expressly waives his right, be prepared to rove, and should prove in the course of the trial, the excepting act or facts.[1]

The Limitation not affected by Provisions of other Articles—*Article 48.* It has been ruled by the Judge Advocate General and the Attorney General that the provision of the 48th Article of war, that a deserter shall be liable to render service to the United States for a period equal to that of his unauthorized absence, and shall remain triable for his desertion although the term of his enlistment may have elapsed prior to his apprehension, &c., cannot affect the operation of the 103d Article by extending the period of the limitation in cases of deserters.[2] The two Articles, the 48th and 103d, are sections of the same code and, not being necessarily repugnant, both must be allowed full effect; and, in the absence of any expression to the contrary, the former provision must be regarded as subject to the general restrictions contained in the latter.

Article 60. So, as has been held by the same authorities,[3] the provision of Art. 60, by which certain offenders are made amenable to justice after their discharge or other separation from the military service, is to be applied subject to the limitation of Art. 103.

Article 71. It might indeed be argued that this Article, in declaring that officers once arrested and released from arrest according to its terms "may be tried within twelve months after such release," rendered such officers subject to trial only within that period, and this notwithstanding that the two years' limitation of Art. 103 might still have a considerable time to run. But as both Articles are now embraced together in the same code, full force is to be given to each so far as practicable. It is therefore deemed to be the reasonable construction to be placed upon the concluding clause of Art. 71 to view it as if there were added thereto the words—"subject to the provisions of Art. 103;" the effect thus given to it being that the "twelve months" are

1. See G. O. 68 of 1829; Do. 52, Dept. of the South, 1870.
2. DIGEST, 88; XIII Opins. At. Gen., 462; XV Id., 156; XVI Id., 396. And see *In re* Bird, 2 Sawyer, 33
3. DIGEST, 88; XIV Opins. At. Gen., 53.

neither to extend nor reduce the time within which an offend is held amenable to trial by the latter Article.

It will thus be seen that the military statute of limitatio admits of no exceptions to its operation other than such as indicated in the statute itself.

THE PLEA OF FORMER TRIAL FOR THE SAME OFFENCE.

Similar at Military and at Criminal Law. This is plea by which an accused party avails himself of the princi incorporated in the 102d Article of the military code, *viz:*—" *person shall be tried a second time for the same offence.*"

In the criminal procedure the defendant takes advantage this principle by means of one of the two pleas of former acq tal, (*autrefois acquit*,) or former conviction, (*autrefois con* according as he has been acquitted or convicted at the for trial. But these two pleas are governed by the same rules,[1] each is but the declaration of the same fact—that a trial been had. The rulings thereupon by the civil courts will the fore be applicable to similar cases at military law.

Former Trial and "Jeopardy" Identical. That man shall be liable to be twice tried or punished for the sa offence, was an ancient maxim of the common law which deriv it from a still earlier period.[2] Whether or not recognizable, has been supposed, in Magna Charta,[3] it may certainly be tr in the precept of the Roman civil law—*non bis in idem.*[4] Brou over to this country by our ancestors as one of their common l privileges,[5] it was incorporated in the Constitution of the Uni States in a form similar to that in which it originally appears the early cases and writings in criminal law,[6] as follows—" *shall any person be subject for the same offence to be twice in jeopardy of life or limb.*" And the same or a similar p vision is contained in the Constitutions of a majority of

1 1 Chitty, C. L., 493; State v. Elden, 41 Maine, 169.

2 U. S. v. Gilbert, 2 Sumner, 38, 42.

3 U. S. v. Gilbert, *supra*; Burns v. People, 1 Park. 184; State Townsend, 2 Harr. 543.

4 Klock v. People, 2 Park. 682.

5 McKinney v. State, 9 Humph. 49; State v. Cooper, 1 Green, 3

6 U. S. v. Gilbert, 2 Sumner, 39–41; Vaux's Case, 4 Coke, 45.

That it takes this form is explained by the fact that, at iod of its origin, all the considerable offences in regard to :his right of defence would be asserted were felonies pun- capitally or by dismemberment.[1] In the present state of ', indeed, the provision, as worded in the Constitution, strictly, to but two or three crimes, as treason, murder, ıcy; but, construing it in the light of its original bearing manifest spirit, the U. S. courts generally have viewed :ering in principle all other crimes,[2] and have held the "put in jeopardy" to mean practically the same as *tried*;[3] ving to such provision substantially the effect of the :ion expressed in the military statute.

ıing of "Tried" and "Trial." In so ruling, these ave further held that the "jeopardy" or "trial" means ;ecution of a case to a verdict; that unless the case has ed at least to an acquittal or a conviction, there has been and therefore no jeopardy.[4] Similarly the word "tried" 102 is to be interpreted as meaning *duly prosecuted before martial to a legal conviction or acquittal.* After such a on the Article prohibits a further trial of the accused (as will hereafter be indicated,) by his own waiver and

aterial whether there has been a Sentence ad- . It is further held by the weight of authority that, to

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n. *v.* Roby, 12 Pick. 502; State *v.* Elden, 41 Me. 169; People vin, 18 Johns. 200.

S. *v.* Gibert, 2 Sumner, 19, 45; 1 Bishop, C. P. § 990.

S. *v.* Perez, 5 Wheaton, 579; U. S. *v.* Haskell, 4 Washington, S. *v.* Gibert, 2 Sumner, 38; U. S. *v.* Shoemaker, 2 McLean, S. *v.* Watkins, 3 Cranch C., 443; U. S. *v.* Riley, 5 Blatchford,)pins. At. Gen., 294; DIGEST, 83. "This clause in the Consti- ay be considered equivalent to a declaration of the common :iple that no person shall be twice *tried* for the same offence." Roby, 12 Pick. 502. It is "an explicit and solemn recognition ıxim of the common law that no man shall be twice tried for offence." Hartung *v.* People, 26 N. Y. 182. [It may be noted, that the rulings of the *State* courts on this subject are variant; ding that a prisoner is "in jeopardy" when he has once been s trial before a jury duly empanelled and sworn.]

authorities cited in last note. A verdict of a *jury* is indeed ıtial: the trial may have been had before a judge similarly d to hear and determine. State *v.* Hodgkins, 42 N. H. 476; Andrews, 27 Mo. 267.

complete the trial, no judgment or sentence is requisite.[1] Th while in the military procedure a sentence properly follows once and as a matter of course upon a conviction, a court-mar will properly hold an accused to have been "tried" in the se of the 102d Article, when he has been duly acquitted or c victed, without regard to whether, in a case of conviction, a s tence or a legal sentence has been adjudged.[2]

Immaterial whether any or what Action has b taken on the Proceedings by the Reviewing Off Further, where the accused in a military case has been once d acquitted or convicted, he has been "tried" in the sense of Article, although no action may have been taken upon the fi ing or proceedings by the reviewing authority. Nor has he b any the less "tried" where the finding has been formally di *proved* by such authority.[3] For the finding is no less a cons mation in law of the *trial*, though, from a cause beyond control both of the accused and the court, such finding has b rendered ineffectual.

To Sustain the Plea, the former Trial must have b a legal one.

1. It must have been before a competent court hav jurisdiction. If the former court either had no legal or or existence, or was without jurisdiction of the offence or

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1 This was the view of Justice Story, in U. S. *v.* Gibert, 2 Sum 88, which is the very decided weight of modern authority.

2 So it is quite immaterial whether an adequate or inadequate p ishment may have ensued. DIGEST, 85.

3 DIGEST, 84. And see Macomb, 72; O'Brien, 277; Bombay, 48. A contrary ruling was made on this point by the Secretary of W in 1844, in the case of Lieut. D. C. Buell, on the ground that a approval renders a finding inoperative. And a similar view was pressed by Gen. Canby in G. O. 32, Dept. of La., 1866. But tho finding may be nullified by the act of a higher power, it is no le complete and legal conclusion by the *court* of the *trial;* and to hold finding, if disapproved, cannot be pleaded in bar of another trial w be to subject an officer or soldier to be tried a second time or an in nite number of times at the will of his commander, where he was acqu when the latter thought he should be convicted, or if convicted, was in the commander's opinion, punished with sufficient severity. Bu Articles of war, while making an approval by the commander nece to the *execution* of the judgment of the court. (Art. 104.) have not vided that such action shall be essential to complete a *trial.*

:rial was a nullity, there was in law no trial, no l the plea cannot be sustained.[1] Thus if, upon a er trial, it appeared that the alleged "trial" was an by a "court of inquiry,"[2] or by a court not duly r composed—as where it was convened by an unau- :er, or was made up, (in whole or in material part,) ıt qualified to sit on the trial; or that it was a trial ıtal or garrison court of a capital offence, or by a t of an offence cognizable exclusively by a civil ıy such case there would have been no former trial he plea would not be tenable.

ırmer indictment, or charge, must have been icient. It has further been uniformly held that the ıpon which the accused was first brought to trial een valid and sufficient in law, and that if it was ma- in substance defective there has been no jeopardy the plea can be based.[3] And the test applied to the .n such cases is—whether the same was one upon l judgment could have been pronounced, or a judg- ence not liable to be reversed on account of defects ctment.[4] Similarly, in a case of a military charge e specification, by reason of the omission of some :ment, is substantially defective, an acquittal or con-

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ns, c. 35, s. 10; 1 Chitty, C. L., 458; Wharton, C. P. & :ens *v.* Fassett, 27 Maine, 282; State *v.* Elden, 41 Id. 170; :nness, 11 N. H. 162; Com. *v.* Roby, 12 Pick. 502; XI en., 140; De Hart, 141; DIGEST, 83. "We think the l, not having been tried before a tribunal legally ıay be brought to trial before a competent tribunal; this is not the case of re-hearing the charge, but a case : has been no trial at all, the court having been illegally Opinion of Crown Lawyers in Boatswain Maxwell's naval court-martial in 1828. Hickman, 124. In G. O. 16, t., 1865, it was held that there had been no "former trial" ıurt, at the time of the supposed trial, had in fact been , and had therefore no legal existence. And see G. O. 72

ston *v.* Jenness, 11 N. H. 156; Wilkes *v.* Dinsman, 7

ıs, c. 35, s. 8; 1 Chitty, C. L., 452, 462; 2 Gabbett, 334; P. & P. § 507; U. S. *v.* Shoemaker, 2 McLean, 117, 120.

ıs, c. 35, s. 8; 1 Chitty, C. L., 454; Com. *v.* Olds, 5 Litt.

viction upon such charge will not protect the accused aga
further prosecution for the offence intended to be but not all
So, a charge upon which an accused has been acquitted o
victed may be so vague and indefinite as that the findi
thereon will be no bar to a second trial for the same
properly pleaded.[2]

3. The proceedings of the former trial must ha
without fatal defect. To make tenable the plea und
sideration, the proceedings of the former trial must ha
"according to law;"[3] or, as it is expressed by Bishop,[4]
"preliminary things of record," necessary to sustain the
must have been "complete." Thus if upon a military t
court is omitted to be sworn as provided in the 84th Art
for any cause is reduced to less than five members at the f
or its proceedings are invalidated by other fatal defect,
quittal or conviction will not constitute a legal trial plea
bar of a subsequent prosecution.

4. The finding itself must have been comple
valid. It may happen that although the proceeding
former hearing were regular and legal down to the findi
may have been so erroneous or imperfect as not to co
legal jeopardy.[8] Thus a jury, in convicting, may fin
part of the matters put in issue in the indictment;[9] or ma

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1. See DIGEST, 84.

2. See De Hart, 145. And compare U. S. *v.* Shoemaker, 2
120; Com. *v.* Hatton, 3 Grat. 623.

3. Com. *v.* Goodenough, Thach. 133.

4. 1 C. L. § 1020. There must not have been what is kno
"mis-trial." See DIGEST, 84.

5. See III Opins. At. Gen., 398.

6. DIGEST, 84. And compare Brown *v.* State, 8 Blackf. 561
it appearing from the record "that the cause had been tried b
jurors, the court held the trial to be a nullity, set aside the ju
and remanded the cause for another trial." And see 1 Bisho
§ 1040.

7. See Macomb, 41.

8. The accused must be *legitimo modo acquietatus.* Vaux
4 Coke, 45.

9. "No judgment can be given on a verdict which leaves u
any part of the matter put in issue." King *v.* Hayes, Ld. Ray

cial finding omitting to include some essential element of crime, as malice;[1] or may find the defendant guilty of an ce wholly distinct in law and fact from that charged.[2] So, urt-martial may find the accused not guilty of the specifica- where there is but one, or not guilty of all the specifications, vet guilty of the charge;[3] or not guilty of the specific of- charged but guilty of another and distinct specific offence ncluded in it;[4] or not guilty of "conduct to the prejudice of order and military discipline," but guilty of a specific ce;[5] or it may in its finding of guilty on the charge make exceptions from the specification or charge as not to leave gh to constitute the offence charged or any offence.[6] In all cases there will have been no legal finding and therefore no trial upon which the present plea can be predicated.

continuance before Finding not equivalent to Ac- al or amounting to Jeopardy. It remains to notice rinciple, applicable equally to civil and military cases, that , instead of a complete trial on the merits, the proceed- re discontinued by some interlocutory action, the accused, h not in fault, is not to be regarded as having been acquitted t in jeopardy. Thus where an indictment has been duly

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ee U. S. *v.* Watkins, 3 Cranch, 570; State *v.* Sutton, 4 Gill, 497. ere the verdict is not "responsive to the indictment." State *v.* e, 17 Iowa, 232.

Vebber *v.* State, 10 Mo. 40.

Com. *v.* Smith, 2 Va. Cas. 327; State *v.* Spurgin, 1 McCord, 252; *v.* Valentine, 6 Yerg. 533; State *v.* Mead, 4 Blackf. 309; Wright te, 5 Ind. 527.

ee this form of finding disapproved as a nullity in G. O. 60, Army Potomac, 1861; Do. 95, 107, Id., 1862; Do. 6, Dept. of Cal., Do. 9, Dept. of the Gulf, 1873.

ee this finding similarly disapproved in G. O. 14, 27, Army of tomac, 1864; Do. 231, Fifth Mil. Dist., 1869.

ee this finding similarly disapproved in G. C. M. O. 78, Dept. of ., 1874; Do. 6, Dept. of the Gulf, 1876.

ee findings of this nature disapproved in G. O. 34, Dept. of the 863; Do. 20, 54, Northern Dept., 1864; Do. 28, Dept. of the N. 1865; Do. 41, Dept. of the Platte, 1870; Do. 6, Id., 1871.

ould be noted here, as applicable generally, that though for any causes mentioned the trial may not have been a legal one, yet if used, having been convicted thereon, has *undergone a sentence* on adjudged, he is not again amenable to trial for the same . 1 Bishop, C. L. § 1023; Com. *v.* Loud, 3 Met. 328.

abated by the entry of a *nolle prosequi*, or on a motion to quash, demurrer, or other proceeding;[1] or where the trial has been broken off by reason of the death or disability of a juror or the judge, or of the defendant himself;[2] or where by reason of an irreconcilable difference of opinion among the jurors the jury has been discharged;[3] the defendant has not been legally "tried" and cannot plead *autrefois acquit* upon a separate trial for the same offence. So, at military law, neither a mere arraignment, nor an arrest followed by a discharge without trial,[5] nor a service of charges withdrawn or dropped without prosecution, nor a withdrawal of the charges after arraignment or pending the trial,[6] nor a discontinuance of the proceedings, by the order of the convening authority, for any cause before a finding,[7] nor a permanent interruption of the same by reason of war or other exigency, nor a failure of the court to agree upon a finding, followed by a dissolution[8]—will amount to an acquittal or a "trial" of the accused.

The Offence for which the Former Trial was had must be the same as that which is the Subject of the Pending Trial. This, or the shorter phrase—"the offences must be the same," is substantially the form in which the proposition is usually expressed.[9] Strictly, however, the more accurate statement would be, that, to sustain this plea, the offences must be either:—(1.) Identical, or (2.) So related, from the fact that one is included in the other, that an acquittal or conviction of the one necessarily puts the accused in jeopardy of the other.

Identical Offences. The identity must, it is held, be one both *in law and in fact;* for, as remarked by Chief Justice Shaw

1. People *v.* Barrett, 1 Johns. 69; Stevens *v.* Fassett, 27 Maine, 26; 1 Bishop, C. L. § 1014, 1021.

2. 1 Bishop, C. L. § 1032; Wharton, C. P. & P. § 508; U. S. *v.* Shoemaker, 2 McLean, 117; U. S. *v.* Haskell, 4 Washington, 402.

3. U. S. *v.* Perez, 9 Wheaton, 579; 1 Bishop, C. L. § 1033, and cases cited.

4. Compare State *v.* Benham, 7 Conn. 418.

5. De Hart, 142, 145; Benét, 100; I Opins. At. Gen., 294; Marston *v.* Jenness, 11 N. H. 156.

6. DIGEST, 83, 84.

7. DIGEST, 84.

8. DIGEST, 84.

9. See 1 Bishop, C. L. § 1049.

ımonwealth *v.* Roby,[1]—"It is obvious that there may be similarity in the facts where there is a substantial legal nce in the nature of the crimes; and, on the contrary, there e considerable diversity of circumstances where the legal :ter of the offences is the same. As where most of the facts entical, but by adding, withdrawing, or changing some one :he nature of the crime is changed."

e identity need be *substantial* only:[2] it is not essential that ıdictments or charges should be expressed in the same lan-ɜ. The circumstance alone that different words are used in ıg forth the offences does not indicate that they are not the for the same offence may be expressed in different terms in ndictments or charges.[3] In a case of doubt, the usual test :ir identity is, the determination of the question whether me evidence will support both.[4]

tances of offences held not identical but distinct.

:, by the application of this test, the offences are ascertained not identical but distinct, a plea of former trial cannot of be sustained.[5] Offences relating to the same subject mat-ıy yet be quite distinct in that the one is not characterized ıe essential fact and legal element necessary to constitute :her. For example, a trial for *embezzlement* cannot be d in bar of a trial for the same act charged as *larceny*, or *rsa*, since the former offence, which consists in the appro-ın of property by the party to whose charge it has been ıtted by the owner, is quite distinct from the latter which :ing without the consent and against the will of the owner. the two offences of the larceny of certain articles and of :eiving and concealing of the same articles; these offences distinct in that the latter is characterized by an *animus* other than that of conversion to the party's own use, an

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: Pick. 503. And see State *v.* Elden, 41 Maine, 170; Burns *v.* 1 Park. 182.

:e 2 Gabbett, 330.

Bishop, C. L. § 1050. And see Wilson *v.* State, 24 Conn. 57, 69.

Bishop, C. L. § 1051; Com. *v.* Olds, 5 Litt. 139; Com. *v.* Curtis, 207; State *v.* Birmingham, 1 Busbee, 122; Durham *v.* People, . 173; Simco *v.* State, 9 Texas Ap. 338; Rex *v.* Sheen, 2 C. &

Chitty, C. L., 452.

ential feature in larceny.[1] So, the offences of larceny of cer-
n property and burglary with intent to commit a larceny of
e same property are held to be so distinct that a trial for the
ie cannot be pleaded in bar to a trial for the other.[2] So, a con-
iction or acquittal of a simple assault and battery has been held
o be no bar to a trial for the same assault with intent to commit
a felony.[3] And a conviction of assault and battery has been de-
clared no bar to an indictment for manslaughter for the killing
of the same person who had meanwhile died of the assault.[4]

Further, two or more offences, though committed at the same
time, by the same act, and as parts of the same transaction, may,
if separable, be wholly distinct in law, so that a conviction or
acquittal of one cannot be pleaded in bar to a trial for another.
Thus a person by the same blow, shooting, or other violence,
may kill or injure two different individuals; but a trial for the
murder, manslaughter, or assault and battery of one of them will
furnish no defence to a trial for the same act committed against
the other.[5] So, where articles of property belonging to different
owners are stolen at the same time by the same person, a con-
viction or acquittal on an indictment for stealing property of one
of the owners will not, as it has been held,[6] (though the author-
ities on this point are variant,) bar a trial for stealing articles
belonging to another.

These remarks and rulings are applicable to military cases.
To add instances from the military service of distinct offences
committed at the same time and in and by the same act,—the
offence of mutiny, or joining in mutiny, may involve with it a
violation of Art. 21; so, the offence of behaving with disrespect
to a commanding officer may concur with that of a disobedience
of his order; so the offence of disobedience of orders, or of ab-
sence without leave, may concur with the offence of misbehaviour
before the enemy. Yet a trial for one of these concomitants

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1 [illegible]

2 [illegible] State v. Warner, 14 Ind. 57[illegible]
[illegible]

3 [illegible]

4 [illegible] 1 Bishop. C. L. § 1059.

5 [illegible] State v. Standifer, 5 Port. 53[illegible]
[illegible] Greenwood v. State, 64 Ind. 250.

6 [illegible] 1 Bishop. C. L. § 1061, and cases
cited.

nces would not operate as a legal bar to a subsequent prosecu-
n for the other.

Military and civil crimes involved in same act. A
rther class of offences, apparently identical but distinct in law,
ay here be noticed. These are the offences which, though
nvolved in the same act, are distinct in this that, while one is
n offence against the ordinary criminal law of a State or of the
United States, the other is a breach of military discipline made
exclusively punishable by the Articles of war.[1] Thus a soldier
convicted by a general court-martial, under Art. 21 or 22, of an
fering of violence or mutinous act which resulted in the killing
f a superior officer, would remain liable to an indictment for
murder in a State or U. S. Court, on account of the homicide
volved; and *vice versa.* Where indeed the offences are crimes
which military courts are invested with jurisdiction concur-
ntly with the criminal courts, (as, for example, the crimes cog-
able by courts-martial under Art. 58, in time of war,) the same
not distinct but identical in law, and an acquittal or convic-
n of one of such offences, or rather of the actual single offence,
a civil court will be a complete bar to a prosecution of the
e in a military court, and *vice versa.*[2]

Offences of which the One is included in the Other.
e cases in which offences are so far included the one within
other, and at the same time so legally related to each other,
t an acquittal or conviction of the one will bar a trial for the
er, may be divided into three classes, as follows:—
. Cases where the offence which is the subject of the pending
al is included within the offence which was the subject of the
mer trial, and is one so related to it in law that under an in-
tment for the major offence there may legally be a conviction
the minor.[3]

. On the subject of double amenability and jurisdiction for military
l civil offences involved in the same acts, see Chapter XIII—"Juris-
tion as affected by Amenability to Civil Proceedings," and authorities
re cited.

. Coleman *v.* Tennessee, 97 U. S. 513–5; People *v.* Gardner, 6 Park.
; G. O. 29, Dept. of the N. West, 1864; Do. 32, Dept. of La., 1866;
ent Com., 341, note; DIGEST, 27.

. "A former conviction is a bar to a trial for any offence of which
defendant might have been convicted under the indictment and proof
e first case." State *v.* Nunnelly, 43 Ark. 68.

hter is as much an acquittal of the charge of murder as a ver-
pronouncing his entire innocence would be." Upon the same
ciple, if an accused, charged with robbery, were convicted
rceny only, he could plead such conviction in bar of a
nd trial for the robbery. So, a conviction of absence-without-
ve under a charge of desertion; or of "conduct to the preju-
e of good order and military discipline" under a charge of
conduct unbecoming an officer and a gentleman" or under a
harge of any specific military offence, is a bar to a subsequent
rial for the offence originally charged.

3. Cases, the reverse of those of the 1st class, where, after a trial for a minor offence which is included in a certain major offence, the accused is brought to trial for the latter.

Here, by the weight of modern authority, the former trial is held pleadable in bar, provided the minor offence is one of which there could be a legal conviction under an indictment or charge for the major.[1] The principle of course is that, as the accused, upon the second trial for the major offence, is legally liable to be convicted of the minor included offence, he is by this trial again put in jeopardy for an offence for which he has already been once tried.[2] Upon this principle an acquittal, upon an indictment for manslaughter, is held pleadable in bar to a second trial for the same homicide charged as murder;[3] a conviction upon an indictment for larceny is similarly held to bar a trial upon a charge of robbery founded upon the same transaction;[4] and a conviction of an assault is held to be a bar to a trial for the battery committed at the same time.[5]

Courts-martial being governed in general by the rules of evidence applicable to criminal cases,[6] a trial upon a charge of absence-without-leave would properly be held pleadable in bar of a subsequent trial for a desertion charged to have been actually

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1. 1 Bishop, C. L. § 1057. And see Com. *v.* Squire, 1 Met. 264–5.

2. 1 Bishop, C. L. § 1057.

3. 2 Gabbett, 33; 1 Bishop, C. L. § 1058; Wrote's Case, 4 Coke, 45; Holcroft's Case, Id. 46; Com. *v.* Curtis, Thach. 206; Com. *v.* Roby, Pick. 504.

4. State *v.* Lewis, 2 Hawks, 98.

5. State *v.* Chaffin, 2 Swan, 93, where the court say:—"The one is necessary part of the other; and if he be now punished for the battery, will thereby be twice punished for the aasault" included in it.

6. DIGEST, 253. And see Chapter XVIII.

committed in and by the same unauthorized absenting of [illegible] self by the accused; and a trial for a disorder or neglect u[illegible] Art. 62, in bar of a subsequent trial for a specific offence wh[illegible] the same disorder or neglect was claimed to have amounted [illegible]

The Form of the Plea, and the Evidence to sustain [illegible] —*Form of the Plea.* "This plea," to employ the descrip[illegible] of Chitty,[1] "is of a mixed nature, and consists partly of matt[illegible] record and partly of matter of fact. The matter of record is [illegible] recital of the former indictment and acquittal or conviction; [illegible] matter of fact is the averment of the identity of the offence [illegible] of the person."

In the military practice, therefore, the plea, (which should [illegible] erably be in writing,) will properly consist of a statement [illegible] effect that, by a court-martial convened by a certain des[illegible] order, the accused was, on or about ———, (giving the prior d[illegible] or time of the trial,) duly tried upon a charge of ———, (recit[illegible] the charge and specification or specifications in full or in s[illegible] stance,) and was duly acquitted or convicted of such charge, &c. [illegible] and that the offence for which he was so tried and acquitted, [illegible] convicted, is the same with the offence set forth in the charge [illegible] which the plea is made. Or if the offences are not identical, [illegible] averment should be substituted to the effect that the offences [illegible] so related that the conviction or acquittal of the former operat[illegible] as a bar to a trial for that which is the subject of the pendi[illegible] prosecution. While the plea in a military case need not be [illegible] technical as in the criminal procedure, a mere general plea t[illegible] the accused had been previously tried for the same offence, wi[illegible] out any of the particulars above indicated, would, strictly, be [illegible] sufficient, and the court would be justified in declining to ent[illegible] tain it without amendment.[3] A plea, indeed, thus or otherw[illegible] imperfect in form, (or a plea showing on its face that the form[illegible] court was an unauthorized body or without jurisdiction, or th[illegible] the charge was an insufficient basis for a finding, or that t[illegible]

1. 1 C. L., 459.

2. A copy of the Order of publication of the proceedings, (if any [illegible] issued in the original case,) exhibiting the charges, findings, &c., [illegible] well be incorporated with or appended to the plea. As to the use of [illegible] same as *evidence*, see *post*.

3. Compare Atkins *v.* State, 16 Ark. 573; Wortham *v.* Com., [illegible] Rand. 677.

g was not a legal one, &c.,) would be liable to be *struck out otion* of the judge advocate. The court, however, would erly afford the accused reasonable time to amend and com- his plea.

xplanation of variance. If there appear on the face of plea any material variance between the two charges, as to me of person, description of property, place, date, &c., such riance should properly be explained by a special averment of ct sufficient to reconcile the two in law; otherwise the plea nay run the risk of being disallowed.[1] So, where, since the former trial, the rank, or office, regiment, corps, &c., of the party has been changed, an averment will properly be added stating the fact and explaining the cause of the change and exhibiting the identity of the accused.

Evidence to sustain the Plea. The burden of the proof of the plea is of course upon the accused.[2] It will be for him to establish—(1) the existence of a record of a legal acquittal or conviction; (2) the fact of the identity of the person and offence. The character and extent of the proof required in a particular case will depend upon the issue made: the prosecution may raverse, orally or by written "replication," either the entire lea or one or more of its averments.[3]

Proof of the record. The record in a military case is comonly proved by a copy of the original as recorded in the Judge dvocate General's Department, (or—if a record of an inferior urt—at the Headquarters of the military Department,) auenticated by the legal custodian in the form usually practiced r the purpose. If the accused, prior to the arraignment, has t had a reasonable time within which to procure the copy, he ll be entitled to a continuance under Art. 93.[4] The judge adcate, however, may admit the existence of the record and its

1. Compare State *v.* Risher, 1 Rich. 219.

2. Com. *v.* Daley, 4 Gray, 209; Wharton, C. P. & P. § 481, 483. at the accused must prove his plea; that the court cannot accept it true on his mere statement without evidence—see G. O. 33, Dept. of izona, 1877.

. Wharton, C. P. & P. § 483; Duncan *v.* Com., 6 Dana, 295.

. 2 Gabbett, 334; 1 Chitty, C. L. 459; State *v.* De Witt, 2 Hill, -2; Com. *v.* Myers, 1 Va. Cas. 232.

contents as stated in the plea, contesting only the legality finding or the identity of the accused. It will then not in eral be necessary to procure a copy of the record: a copy i of the General Order promulgating the proceedings of the f trial, and setting forth the convening of the court and the the charges and specifications in full, and the findings, m such case be quite sufficient for the use of the parties and form the court. If it is the legality of the trial which is tested, the issue must be determined upon the record itse the Order as presenting its main features;) no extrinsic evi being admissible to vary or contradict it.[1] If upon the f the record, (or from the Order as its substitute,) it appear the court was not legally constituted, or was without jurisdicti or that the proceedings were fatally irregular, or that the charg or finding was insufficient in law,—the defect cannot be rem edied by other testimony, and the plea, upon the principles here tofore considered, must be overruled.

Proof of identity. To establish, however, the averment o identity, either as to person or as to offence, evidence outside th record is admissible.[2] Whether indeed the offences are the sam will in general be apparent from a comparison of the circum stances, names, places and dates, set forth in the specifications o the two charges. But where there is a material and substanti variance between them, some evidence, such as the testimony o the officer or officers who preferred or investigated the severa charges, the judge advocate who conducted the original prosecu tion, or other individuals familiar with the facts, will be neces sary to assimilate the offences.[3] As to the identity of the *per son*, evidence on this point will be especially called for whe a considerable period has elapsed since the former trial, and th soldier then appeared under an *alias* or has since changed hi name, and the second trial is ordered at a station remote fro that of the first: in such cases some testimony such as that of

1 Douglass v. Wickwise, 12 Conn. 489; Martha v. State, 26 Ala. 7

2 Wharton, C. P. & P. § 481; People v. McGowan, 17 Wend. 415 [illegible] Dunn v. State, 70 Ind. 47.

3 [illegible] Wilson v. State, 24 Conn. 63; Durha [illegible] People v. McGowan, 17 Wend. 389. Whe [illegible] distinct offences, there can be n [illegible] to assimilate the offences will b [illegible] Martha v. State, 26 Ala. 72.

ıber or the judge advocate of the former court, or of a witness ıe trial, or other person then present or otherwise recognizing accused as the same individual, will be required to sustain plea.

Vaiver of the Right to Plead Former Trial. It is now ıdantly established by the adjudications in criminal cases the constitutional right to be exempt from being twice put in ardy, or twice tried, for the same offence, being for the sole ɜfit of the accused party, may be, expressly or impliedly, *ved* by him.[1] The same principle has been recognized at itary law. It was held by Attorney General Wirt, in 1818, that provision of the Articles of war, that "no person shall be ɜd a second time for the same offence," did not apply to a case which the accused, upon a conviction and sentence being dis- ɔroved by the reviewing authority, himself applied for a new ıl; the right to take advantage of the provision of Art. 102 ng thus deemed to be waived.[2] An accused would, it is be- ɜd, also waive by implication this right, where he applied he reviewing authority or President to have a conviction and ɜence in his case disapproved or pronounced invalid on the ınd of illegality, and this action was taken as requested.[3] An ısed, who had in fact been previously tried for the same of- ɜe, would also waive this right by intelligently pleading guilty ot guilty without interposing the special plea under consid- ion.[4]

leading over. The plea of former trial being overruled by court, the accused will be required to plead over to the charge

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1 Bishop, C. L. § 992, 995, 998, 1001, &c.; Wharton, C. P. & P. 8; U. S. *v.* Harding, 1 Wallace Jr., 127; State *v.* Gurney, 37 ıe, 156; Veatch *v.* State, 60 Ind. 291; Brennan *v.* People, 15 Ills.

I Opins., 233. As to the few cases in which similar action has since taken in the military practice, see DIGEST, 345. The new trial has rally been granted as a special indulgence to the accused in lieu of ɔving and executing his conviction and sentence.
connection with the view of Mr. Wirt that the benefit of the provis- f Art. 102 may be waived by the accused, may well be noted his expressed two years later in I Opins., 383, that the benefit of the sion of Art. 103 may *not* be waived. (See *ante*, Chapter VIII, and note.) It would seem that if either Article was to be regarded ɔolute or prohibitory, it would be the former rather than the latter.
Compare 1 Bishop, C. L. § 998.
See *post*—"Pleading over."

upon the merits, either guilty or not guilty, precisely as if no pl in bar had been interposed.[1] The special plea and the plea the general issue should be kept quite distinct in practice; th former being disposed of before proceeding to the other.[2] A the accused cannot properly be allowed to put the fact of the fo mer acquittal or conviction in evidence under the general iss of not guilty, but should in all cases plead it specially.[3]

PLEA OF PARDON.

A pardon is an act of grace and mercy presupposing only t commission of an offence;[4] and it is well settled that, under t plenary power conferred upon him in this respect by the Con tution, the President, while not often exercising the same bef conviction,[5] may legally pardon an offender in advance of tri Hence the legality and fitness of a *plea of pardon* in a case whe after such action, the party is sought to be prosecuted.

Leaving the subject of the nature and extent of the pardon power in military cases to be more appropriately considered treating of the function of the Reviewing Authority under 112th Article of war,[7]—we will here notice in brief:—I. T occasions and grounds for the plea of pardon in the milit practice; II. The form and proof of the plea; III. The proceed upon the plea.

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1. Wharton, C. P. & P. § 486. Com. *v.* Goddard, 13 Mass. 4 Benét, 108.

2. "They are distinct issues, and the jury must be separately charg with them." Until the issue under the special plea is disposed "there can be no trial in chief." Henry *v.* State, 33 Ala. 399, 4 And see Foster *v.* State, 39 Ala. 229; Dominick *v.* State, 40 Ala. 60

3. State *v.* Barnes, 32 Maine, 530; Com. *v.* Olds, 5 Litt. 140. T defence of former trial is thus distinguished from that based upon statute of limitations; the latter may be taken advantage of upon general issue. See *ante*.

4. I Opins. At. Gen., 342; VI Id., 21; *Ex parte* Wells, 18 How 311.

5. "A variety of considerations seem to me to render it expedi generally, to interpose the pardoning power previous to trial." A Gen. Berrien, II Opins., 275. And see V Id., 729; VI Id., 21.

6. I Opins. At. Gen., 342; VI Id., 20–1, 405; VIII Id., 283–4; Id., 227. "The power extends to every offence known to the law, may be exercised at any time after its commission, either before proceedings are taken, or during their pendency, or after conv and judgment." *Ex parte* Garland, 4 Wallace, 380

7. See Chapter XXI.

I. OCCASIONS AND GROUNDS FOR THE PLEA.

is plea may be offered:—1, Where the accused has been ally formally pardoned; 2, Where he is included in a gen- act of pardon or amnesty; 3, Where he has been pardoned tructively.

Special Pardon. Special pardons of military offenders he President have not been frequent; prior to conviction, have been most rarely extended; and no instance is known e formal pleading of one upon an arraignment before a court- ial. Such a pardon, duly pleaded, would of course constitute nplete bar of trial.

General Amnesty to Deserters, &c. An informal plea rdon has in some cases been interposed in the military prac- where the accused has or claims to have been included in a ral amnesty, offered by the President,[1] in the form of a amation or General Order, to deserters or absentees.[2] Par- as it has repeatedly been remarked, may be conditional— upon conditions precedent or subsequent;[3] and these am- s have generally proceeded upon the condition precedent the party shall return and surrender himself by a certain hile some of them have contained the condition subsequent e shall duly perform duty for the remainder of his term, good the time lost by his desertion, &c. Where a pardon nted upon a condition precedent, the pardon does not take

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hat the pardoning power includes the power to extend amnesty, avies *v.* McKeefy, 5 Nev. 369; U. S. *v.* Klein, 13 Wallace, 128; rong *v.* U. S., Id. 154.

ee Proclamations or Executive Orders of this character, (generally after a war,) published or referred to in the following Orders of ar Dept.: *viz.* G. O. of Nov. 5, 1811; Do. of June 17, 1814; Do. 8, 1815; Do. 35 of July 6, 1848; Do. 58 of March 10, 1863; Do. March 11, 1865; Do. 43 of July 3, 1866; Do. 102 of Oct. 10, [De Hart, (p. 144, note,) refers to a further proclamation of this ter, as "made by the President, after the termination of the Black War in 1832, when many soldiers deserted from dread of the ."] The proclamations and orders of March 10, 1863, and 11, 1865, were issued pursuant to directions of Acts of Congress. lamation of this class was directed to be issued by Gen. Washing- a Resolution of Congress of Oct. 17, 1777. (2 Journals, 294.)

Hawk., c. 37, s. 45; 4 Black. Com. 401; *Ex parte* Wells, 18 l, 307; Com. *v.* Haggarty, 4 Brewst. 326; VI Opins. At. Gen., I Id., 229; DIGEST, 359.

effect till the performance of the condition: where the is subsequent, the failure to perform it nullifies the gra

3. Constructive Pardon. Where a deserter has stored to duty without trial, under par. 218, Army Re 'by the authority competent to order his trial,' this regarded as a constructive condonation of the offence, be pleaded in bar of a trial subsequently ordered.[2] ; motion or appointment to a new office, of an officer of t while under arrest and charges for the commission of military offence, will operate as a constructive pardon offence, and constitute a valid bar to a trial therefor.[3] mere restoring to command or duty, or ordering on dt officer or soldier, when in arrest under charges, by his c ing officer, while regarded in the English law[4] as pra pardon and pleadable as such in bar of trial, is not autl our law to be so treated, (except in the single case ab tioned as provided for in the Army Regulations,) and treated in practice.[5] Nor can the mere fact that cha preferred have been dropped by a commander be pleac as a constructive pardon of the same, upon their bei quently revived and brought to trial in connection wit for offences since committed.[6]

II. FORM AND PROOF OF PLEA.

Form. The plea may be oral or in writing. Wher don is a special one, *i. e.* a formal pardon of the indiv

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1. Flavell's Case, 8 W. & S. 197 ; VI Opins. 405. And s Klein, 13 Wallace, 142 ; DIGEST, 359. "If a condition sub broken, the offender could be tried and punished for the origi The breach of the condition would make the pardon void." At. Gen., 229.

2. DIGEST, 224–5. And see G. O. 4, Dept. of the West, 1 the plea was sustained in cases of soldiers, not deserters, r duty while under charges, in the same manner as desert Department Commander, in a General Order.

3. IV Opins. At. Gen., 8 ; VI Id., 123 ; VIII Id., 237 ; DI

4. Simmons § 565–7 ; Clode, 1 M. F. 173, (citing opini Duke of Wellington and Judge Advocate General Villiers, a Lord Lucan, Col. Quentin, Capt. Achison, &c.) And see gast, 244–5 ; Gorham, 28–9 ; Jones, 28 ; Twyford, 35 ; DIGE

5. DIGEST, 358 ; De Hart, 144 ; Benét, 119 ; Ives, 100.

6. See case in G. C. M. O. 13 of 1871.

a should properly be in a written form setting forth the date the pardon, by whom granted, and its substance, with an averment to the effect that the offence pardoned is the same with hat which is the subject of the charge. If the grant is made pon a condition precedent, a compliance with the same should e alleged; if upon a condition subsequent, it should be averred at the same had been accepted. Where a pardon is claimed der a General Order or proclamation of the President, it will e sufficient to refer to the same orally or in writing, stating its te and substance or effect, with an averment that the accused longed to the class described therein, and that he has complied th the conditions imposed thereby; as, for example, in returns as a deserter or absentee, by the time fixed, in since render- due service as a soldier, &c. If a constructive pardon is ed upon, the fact or facts claimed to constitute a pardon in law st be set forth—as that the accused was, by a certain order, ing its date and source, restored to duty as a deserter under 218 of the Army Regulations; or that, since his arrest and the erring of the present charges, he has been, by the President, noted to a higher rank or appointed to a higher office in the y, &c.

roof. In connection with a plea of special pardon, the inal pardon should be produced in court, since the court can take judicial notice of a personal grant of this character.[1] n a case of a deed, the acceptance of the pardon will be in- d from the fact of the making of the plea, without other f. If the pardon be conditional, the accused should show he has duly and fully performed the condition, or has per- ed it as far as practicable up to the date of the plea.[2] In ling an amnesty offered to deserters, the accused,—if the fact not appear from the averments of the specification or is not itted by the prosecution,—must show that his case is em- ed within the terms of the offer,[3] (not being included in any

See U. S. *v.* Wilson, 7 Peters, 161. It may be noted here that f of a promise to pardon is not evidence of pardon: the promise executory may be withdrawn. XI Opins. At. Gen., 230. A va- e in a pardon as to the name or description of the beneficiary may plained by evidence. 2 Hawk., c. 37, s. 66; 2 Gabbett, 340.

VI Opins. At. Gen., 405; Simmons, § 564; Griffiths, 99; Ma- , 40; O'Brien, 249; De Hart, 144.

It must appear that he was a deserter at the date of the proclama-

excepted class, if exceptions are made,[1]) and further,—if this al[illegible] does not appear from the specification or is not conceded by th[illegible] prosecution,—that he surrendered himself or returned voluntari[illegible] within the time limited, and has since duly performed servi[illegible] &c.[2] A copy of the Order or proclamation as published w[illegible] properly be added and entered of record with the plea; but [illegible] the existence and contents of such Order, &c., the court w[illegible] take judicial notice without proof. A constructive pardon w[illegible] be proved by the order, issued by competent authority, restori[illegible] the party to duty as a deserter under the Army Regulations, wi[illegible] evidence, if necessary, of the identity of the accused with the pe[illegible] son described in such order; or by the executive appointment [illegible] other fact or facts relied upon as constituting a legal pardon. [illegible] the accused requires time, (as he well may where his station h[illegible] been changed, or he has been transferred to a distant comma[illegible] &c., since the date of the alleged condonation,) in order to ma[illegible] profert of a special pardon, to produce or prove an order restori[illegible] him to duty, to establish his identity, &c., a reasonable conti[illegible] ance will in general properly be granted him for the purpose.[3]

The prosecution may take issue on the plea;—may reply th[illegible] the pardon has been obtained by fraud;[4] that the accused is [illegible] identical with the person claimed to be pardoned; that he h[illegible] not complied with the conditions prescribed, &c.

III. Procedure Upon the Plea.

Upon the plea being interposed, (and the pardon, order, &c[illegible] being produced, if any,) the proper proceeding is for the jud[illegible] advocate, if he has no exceptions to take, to enter, (with t[illegible] authority of the convening officer,) a *nolle prosequi* upon t[illegible] charge or charges covered by the pardon. If he contests t[illegible]

[illegible] Order [illegible] deserting later he could not of course be held to [illegible] included in the amnesty [illegible] G. O. 5, Dept. of the East, 1866.

[illegible] Partridge's Case, Cro. Eliz. 125.

[illegible] Simmons § [illegible] Griffiths, [illegible]; Macomb, 41; De Hart, 144. [illegible] case published in G. O. [illegible] Dept. of the East, 1865, a deserter, hav[illegible] been arrested [illegible] by the civil authorities, claimed, in order [illegible] to return to the army under a proclamation [illegible] the President. It was properly held that such a return could not [illegible] And note case referred to in DIGEST, 359, § [illegible]

[illegible] On the subject of Continuances, see C[illegible] [illegible] XV.

[illegible] 4 Black. Com. 400; XI Opins. At. Gen.,

, it will remain for the court, upon the evidence furnished argument made, to deliberate and pass formally upon the :. If the plea is overruled, the accused—as in the case of the ruling of a special plea of former trial—is, regularly, called ı by the court to plead to the merits, and the trial goes on. If plea be sustained, the court does not proceed to *acquit* the sed, since the pardon was based upon the theory of his guilt, his acceptance of it was substantially an admission of guilt ıw.[1] The court therefore merely adjudges that the plea is ved, and terminates its proceeding in the case; the record going to the reviewing authority, who, if he approves the n taken, will order the discharge of the prisoner.

pardon existing at the time of the arraignment should be sought to be taken advantage of by this plea, since the ben- f it will be waived by a plea of guilty or not guilty.[2] A ɔn, however, may reach an accused after the trial has been nenced on the merits; in which case the judge advocate, (no ion appearing for raising an issue,) will, (with the sanction e reviewing authority,) properly enter a *nolle prosequi.*[3] d, as it has been remarked by Atty. Gen. Cushing,[4] the Pres- , without resorting to a grant in the ordinary form, may cally exert the pardoning power "by order of *nolle prosequi* ng a prosecution."

INADMISSIBLE SPECIAL PLEAS.

ide the regular special pleas above considered, a few others, roperly admissible as separate pleas, have in some instances offered in military cases—as follows:

rmer Punishment. The plea of former punishment, *i. e.* the accused has already been adequately punished for his e by his commanding officer, though recognized in the sh practice,[5] is not known to our military law,[6] and when

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XI Opins. At. Gen., 228.

Hawk., c. 37, s. 59, 67; 4 Black. Com. 402; 2 Gabbett, 340–1; v. Wilson, 7 Peters, 162; Hough, 905.

As to this proceeding, see Chapter XV.

VIII Opins., 283, 284.

immons § 561–563; Army Act, 46, (7.)

ee De Hart, 145; Benét, 103. A plea of this nature, however, to be recognized in the practice of our navy. See case of Lieut.

made on our military trials has been properly overruled.[1] Whe indeed an accused has, prior to trial, been subjected, on acco of his offence, to any physical punishment, or to reduction to th ranks, or to a protracted arrest, or other unusual or unauthori discipline, he may properly show the fact in evidence on th general issue, in mitigation of such sentence as the court, in th event of his conviction, may impose.[2] But, except in this form he cannot avail himself of such circumstances, upon a trial.

Illegal Enlistment. The accused, upon arraignment, h sometimes pleaded that on account of some illegality in his e listment, as that he was under age,[3] or that he was enlisted f three years when the law required that all enlistments should b for five,[4] &c., he was not amenable to trial. But no such form of special plea is recognized in our law. If the accused, by rea son of an invalid enlistment, is not duly or legally in the army he should, regularly, offer the facts in evidence under a *plea the jurisdiction*, or bring them out under the general issue.

Release from Arrest, &c. Release from arrest upon th charges, and restoration to duty, before trial,—already notic as not ground for a plea of pardon, (except in cases of deserte under par. 218, Army Regulations,)—is, similarly, no ground f a special plea in bar of trial.[5]

Other Subjects. Such objections, (which have been take in some cases,) as that the accused at the time of the arraig ment is undergoing a sentence of general court-martial;[6] or th owing to the long delay in bringing him to trial he is "unab to disprove the charge or defend himself;"[7] or that he has n

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Stanley in Captain Jones' Trial, p. 310; also case in G. O. 137, Na Dept., 1869.

1. G. O. 27, Army of the Potomac, 1861; Do. 73, Third Mil. Dis 1868; Do. 12, Dept. of Cal., 1871; G. C. M. O. 71, Dept. of Dakot 1882.

2. DIGEST, 360. And see the three last G. O. cited in the preced note.

3. G. O. 52, Dept. of the East, 1869.

4. G. O. 82, Dept. of Dakota, 1869.

5. G. O. 7, Dept. of the Mo., 1868; Do. 32, Fifth Mil. Dist., 1868.

6. G. O. 30, Dept. of the Pacific, 1864.

7. G. C. M. O. 85, Dept. of the Mo., 1869. And see G. O. 33, De of Arizona, 1871.

ɪurnished with a copy, or a correct copy, of the charges;[1]
:t his accuser is actuated by malice or is a person of bad
cter,[2]—are, it need hardly be said, not proper subjects for
al pleas; however much they may constitute ground for con-
ɪnce, or affect the question of the measure of punishment.
, as to all such objections as are properly matters of *defence*
:r the general issue,—for example, that the accused com-
ɜd the offence charged when insane or intoxicated, or in
ience to a military order, or under a mistake of fact or law,
—these are not within the scope or purpose of special pleas
ɪr, nor can they properly be raised in any interlocutory form
herwise than upon the trial and by the testimony, being, as
are, of the very substance of the defence.

IV. PLEA OF GUILTY OR NOT GUILTY.

: accused, upon arraignment, having no special plea or
to offer, (or having presented a special plea or motion which
en overruled,) proceeds in regular course to plead—orally—
· or Not Guilty, as the case may be, to the several charges
ecifications in their order.

m of the Plea—Qualifications and Exceptions. The
l form of this plea has already been indicated. As to this
: is laid down by the authorities that it must be "express,
and unqualified," no statement in exculpation or justifica-
:ing admissible in connection with it.[3]
though no such matter of evidence, or other matter of
ation, can form part of this plea, it may yet, at military
: qualified in so far that the accused may *except* from the
ıtion of his answer of guilty or not guilty to a specification
. words or allegations indicated by him. Thus he may
guilty to a specification except as to some averment or
:nts of fact, or as to a word or words expressive of the in-
arged, and to this or these, not guilty; or he may plead
:lty to a specification except as to some portion which is
:d, and to this portion guilty.

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e De Hart, 147.
O. 33, Dept. of Arizona, 1871.
Black. Com. 333; Adye, 158; Tytler, 239; Kennedy, 92; Sim-
552; Maltby, 53; De Hart, 134, 135; G. O. 107, Dept. of the
)3.

Another form of qualification of this plea, is the plea not guilty of the charge as laid, but guilty of a *lesser offe* cluded and involved in it. Thus a soldier accused of de but claiming that he is chargeable only with an unaut absence, may legally plead not guilty of the offence char guilty of absence-without-leave. And in so pleading he further, *except* from his plea of guilty such words in the sp tion as characterize the offence of desertion, substituting, if sary, words describing the offence actually admitted.[1] Thi of qualifying and excepting, though not essential since the may find the lesser offence if the evidence warrants it, unfrequent in practice.

Inadmissible forms. An accused may plead guilty specification but not guilty of the charge, since such plea a legal issue, *viz.* whether the facts alleged in the specific do constitute the offence charged.[2] But the converse plea guilty of the specification but guilty of the charge, is w illegitimate. It neither confesses anything nor contests thing, but consists of two incompatible answers which n the issue, and cannot be admitted as pleas by the court.[3] the plea to a charge or specification of "*guilty but without inality*," though sometimes admitted in practice, is irregula contradictory and not to be sanctioned.[4] It is practically eq lent to "not guilty" and should properly be made in this

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1. In such a case the plea would ordinarily be—To the Specific Guilty, except as to the words "did desert," substituting the wor *absent himself without authority from*; to the Charge, Not Guilt Guilty of Absence-without-leave. Or the plea to the Specification be Guilty, except in so far as it alleges desertion; or Guilty, o far as it alleges absence-without-leave.

2. This plea may sometimes be made by a soldier through ign when he really does not mean to admit the substance of the specific In such a case it was remarked by the reviewing authority, in G. C. 70 of 1875 "The court should have advised him to frame his plea intelligently."

3. G. O. 76, Dept. of the East, 1864.

4. In a case in G. C. M. O. 52, Dept. of the Columbia, 1881, of this kind offered by the accused was refused to be received b court, which required him to plead anew. On his then standing the court directed the plea of not guilty to be entered to both and specification

Effect of the Plea as a Waiver. The effect of the plea of lty or not guilty is to *waive* any defects of form in the charges l specifications, which might be taken advantage of by plea in atement, or its substitute a motion to strike out. By this plea, e accused admits his own identity with the person described the charges as the offender, and foregoes objections to the same inartificial, indefinite or redundant, &c., as well as to the allegations of particular matters of description, or of time and place, being obscure or incomplete.[1] A substantial defect, however, ing to the sufficiency of the charge as a statement of a military ence, is not waived.[2] Nor of course can any such radical defect as an illegality in the constitution of the court, or an absence jurisdiction of the offence or the person, be done away with lessened by this plea.[3]

The Plea of Not Guilty—its legal effect. This plea, which by far the most frequent in all criminal proceedings, whether il or military, is also known as the *general issue* because it ies and puts at issue and to trial all the material allegations the indictment or charge. Where a contest on the merits is posed, this plea is an essential element of the proceedings ich cannot be dispensed with. It must be made by the aced and entered of record as a starting point: in its absence court cannot supply an issue.[4]

n law "not guilty" is not a denial by the accused of the doing the specific acts or things set forth in the charge. He may e done none of them, while, on the other hand, he may have e all of them, and the plea be as proper in the latter case as former. For what he denies is not the details but the com-

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Wharton, C. P. & P. § 413; III Opins. At. Gen., 549; O'Brien, -1; G. O. 48., Dept. of the South, 1864; Do. 10, Dept. of the Cumand, 1867; Do. 2, Dept. of the Platte, 1871; DIGEST, 211, 379.

Fletcher *v.* State, 7 Eng. 170; DIGEST, 379.

DIGEST, 211, 379–380. In Gen. Hull's case, (Printed Trial, p. 118,) court, referring to the charge of "treason" preferred against the acd, expresses the opinion that a court-martial "cannot acquire jurison of the offence by the waiver or consent of the accused." That a of jurisdiction cannot confer jurisdiction where none exists in law, pare People *v.* Campbell, 4 Park. 386; Do. *v.* Rathbun, 21 Wend. Shoemaker *v.* Nesbit, 2 Rawle, 201; Moore *v.* Houston, 3 S. & R. Duffield *v.* Smith, Id. 599.

Wharton, C. P. & P. § 409; 1 Bishop, C. P. § 801; Douglass *v.* , 3 Wis. 821.

mission of the offence which these details describe, in other words the particular offence which, it is alleged, the details constitute.[1] Thus the accused may well admit the *act* charged but not admit the *animus* ascribed to it; or he may admit the act and defend it on the ground that it was enjoined by superior authority, or compelled by an exigency of war or of the service, &c. The plea is thus a legal issue, not a moral disclaimer; it commits the party resorting to it to no falsehood or deception.[2] Even where every material averment in the charge is admitted to be true, and no defence to the same exists on the merits, this plea is always justifiable, since it is in general only through this legal form that all the circumstances surrounding the offence, and which, taken together, may very considerably extenuate its criminality, can be brought out in evidence, and the proper measure of punishment be duly determined.

The Plea of Guilty—its legal effect. The effect in law of this plea is that of a confession of the offence or admission of the act *as charged.* But it is to be noted that such plea does not necessarily confess that a particular legal offence has been committed, for it admits only what is charged. If the alleged offence indeed is duly set forth in the charge, such offence is confessed by this plea, and a formal conviction of the same must follow.[3] If not duly set forth,—if the facts stated in the specification fall short of constituting the particular offence,—there is no such confession by the plea of guilty and the accused cannot legally be convicted.[4]

Reception of this Plea—Withdrawal. This plea is one which military courts, in common with civil, should not too readily receive,[5] and which, (as has already been remarked,) a judge advocate should not attempt to induce to be made. Where there

1. See Kennedy, 93.

2. Kennedy, 93; Com. v. Battis, 1 Mass. 94.

3. 1 Bishop, C. P. § 795. This is "the highest kind of conviction of which the case admits." 1 Chitty, C. L., 428–9.

4. Wharton, C. P. & P. § 413; 1 Bishop, C. P. § 795; Fletcher v. State, 7 Eng. 170. Where the charge is defective in that the offence is laid under the wrong Article of war, "the plea of guilty cannot enlarge the power of the court." G. C. M. O. 32, Dept. of the Mo., 1871.

5. 4 Black. Com. 329; 2 Gabbett, 319; 1 Bishop, C. P. § 795; Tyler, 237; Kennedy, 86; De Hart, 136.

:ason to suppose that such plea is not both voluntary and intelli-ent, or that the accused does not appreciate its legal effect, or is nisled as to its influence upon the judgment of the court, he should e advised by the court not to interpose it but to plead instead 'not guilty.' So, where, after it has been duly made and received, he accused asks to be allowed to withdraw it and substitute the general issue, he should ordinarily be permitted to do so:[1] indeed he *court* will properly advise or suggest such substitution if the ame appears to be in the interests of justice.

This Plea in connection with an Inconsistent "Statement." For the action last indicated there is especial reason here the accused, upon his plea of guilty, proceeds, as has often een done by enlisted men ignorant of the legal effect of the course ursued, to make to the court a "statement" setting forth facts uite inconsistent with such plea. Thus, a soldier, after having leaded guilty to a charge of desertion, will sometimes, in a final ldress to the court, state facts going to show that his unauthor-ed absence was unaccompanied by the *animus* peculiar to deser-on; or, where the charge is larceny, that his unauthorized tak-g of the property was not characterized by an *animus furandi.* t such cases, while the representation made is often a mere pre-nce, the fair inference may not unfrequently be that it is the atement which is accurate and intelligent rather than the plea, d that the accused has really a good defence to the charge, or guilty only of a minor offence included in it. In other cases, e statement, while not strictly inconsistent with the plea, will t forth matters of extenuation which, if established in evidence, ll very materially palliate the offence admitted by the plea. all such cases the court, if it has reason to believe that the tement is made in good faith, will in general properly advise e accused to withdraw his plea of guilty, substituting a plea of t guilty, and, upon this being done, will call upon the judge vocate to introduce such evidence as may be readily available investigating the facts stated by the accused, with a view to ertaining the exact offence committed and the amount of crim-

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[1] 1 Bishop, C. P. § 798; Wharton, C. P. & P. § 414; 2 Gabbett, 319; tler, 237; Hough, (P.) 780; State *v.* Cotton, 4 Fost. 143; People McCrory, 41 Cal. 458; DIGEST, 378–9. So, the court may in its cretion permit the plea of not guilty to be withdrawn and that of lty, or a special plea, to be substituted. 1 Chitty, C. L., 423; ishop, C. P. § 801.

inality to be attached to it. Such was the opinion and of Judge Advocate General Holt in repeated cases of s- brought to trial during and since the late war,[1] and his vie adopted in Orders by the Secretary of War.[2] It was also and followed in numerous cases by commanders of milit partments, &c., by whom the proceedings of courts-marti which such action was neglected to be taken, were freq disapproved.[3]

Introduction of Evidence with the Plea of Guil general. But, *in general also*, and where the plea is intellig made, the same, though a confession of the offence as charg held by the weight of authority not to prelude the introducti evidence to exhibit the full facts of the case. While it w doubt the practice formerly, as it is now in the majority of in which this plea is interposed, not to take any evidence ever, the fact that *some* evidence was necessary to a compr

1. DIGEST, 377–8.

2. In the cases of two soldiers published in G. C. M. O. 2, of 18 which the written statements submitted by the accused were cont tory of their pleas of guilty, it was remarked by the Secretary of as follows: "The Court should have regarded these statements as tralizing the effect of their pleas, and should have had the ac instructed as to their legal rights, and advised to change their pleas a view to the hearing of testimony. It not unfrequently happens soldiers do not understand the legal difference between absence-wit leave and desertion, or are wholly unable to discriminate as to the g of their offences, as determined by their motives. They thus, somet ignorantly plead guilty and are sentenced for crimes of which they be actually innocent. The proceedings, findings, and sentences are approved." And see G. C. M. O. 31, 1876; also Do. 63, 1874; 91 of 1881. A similar view has now been adopted into the English See Rules of Procedure, 36 (A.)

3. See G. O. 34, Northern Dept., 1865; Do. 33, Dept. of the C 1866; Do. 46, Dept. of the South, 1868; Do. 7, Id., 1869; Do. 22, 1871; Do. 22, 71, Id., 1873; Do. 28, Dept. of the Platte, 1869; Do Id., 1870; Do. 2, 24, 68, Id., 1871; Do. 88, Dept. of Texas, 1870; 19, 33, 38, Id., 1873; Do. 11, 16, 18, Id., 1874; Do. 45, Id., 1875; (M. O. 98, Dept. of the East, 1872; Do. 14, 43, 68, Id., 1873; Do. 81 98, Dept. of Dakota, 1873; Do. 8, Id., 1876; Do. 31, Dept. of Cal., 1 Do. 55, Id., 1874; Do. 5, 74, Dept. of the Mo., 1875; Do. 61, Id., 1 Do. 77, 80, Id., 1881; Do. 29, Div. of the Atlantic, 1874; Do. 23 1875; Do. 144, Div. of Pacific & Dept. of Cal., 1880; Do. 1, Dep Dakota, 1885; also Do. 69, Hdqrs. of Army, 1877, (remarks of Hancock.) The instances referred to in these Orders, while m cases of desertion, include also cases of larceny and of drunkenne duty.

a considerable proportion of such cases seems to have ppreciated at an early period. Thus in a General Order .rmy Headquarters—No. 60—of 1829,[1] it was enjoined, by neral Commanding, upon courts-martial in capital cases, ecially cases of desertion, not to receive the plea of guilty, ıtering for the prisoner the plea of not guilty, to "deter- ıe grade of the offence and *quantum* of guilt by the char- f the evidence produced to them." Next, in a General No. 23 of 1830, it was declared by the same authority "In every case in which a prisoner pleads guilty, it is the the court-martial, notwithstanding, to receive and to re- its proceedings such evidence as may afford a full knowl- the circumstances; it being essential that the facts and lars should be known to those whose duty it is to report case, or who have discretion in carrying the sentence into

Later, in No. 21 of the Orders of 1833, the General nding, in remarking that the old rule, that no evidence be received with the plea of guilty, had been abrogated nt Orders, disapproves the action of a certain court-martial garding the same and refusing to allow the judge advocate , notwithstanding such plea, the facts and circumstances case, which—it is declared—are essential both to the re- officer and to the President as the pardoning power. er, in G. O. 36 of 1835, another court-martial is pointedly d for a similar disregard of Orders and of the opinion of orney General. This was an opinion of Atty. Gen. But- the case of Cadet Crittenden, addressed to the Secretary on April 11, 1834,[2] 'in answer to questions proposed upon nent prepared by Gen. Macomb.' It is here held that— he duty of a court-martial in all cases where the punish- f the offence charged is discretionary, * * * and the ations do not show all the circumstances attending the to receive such testimony as the judge advocate may the purpose of illustratiug the actual degree of the of- notwithstanding the party accused may have pleaded

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is ruling was preceded by that of the court in the case of Capt. of the Navy, in 1822, where it was held that the plea of guilty cused should "not prevent the introduction of any testimony e court may deem it necessary to hear on the part of the prose-

blished in II Opins. At. Gen., 636; also in G. O. 32 of 1834.

guilty. * * * If there be any exception to this remark it is where the specification is so full and precise as to disclose all the circumstances of mitigation or aggravation which accompany the offence. Where that is the case, or where the punishment is fixed, and no discretion is allowed, explanatory testimony cannot be needed." This opinion was incorporated in par. 3 of Art. 35 of the issue of the Army Regulations of December 1836. In the Regulations of 1841, the opinion, condensed to a few lines, and limited to "cases of enlisted soldiers," is published as par. 228; and the same paragraph, (numbered 320,) is repeated in the issue of 1847. It does not appear in the Regulations of 1857 nor thereafter. Revived during the late war, attention was frequently called to this principle by the Judge Advocate General who held that a court-martial was authorized, notwithstanding the plea of guilty, and even where the sentence was not discretionary,[1] to receive evidence on the merits, with a view to determining the actual criminality of the offender and the measure of punishment which should properly be executed, in any case in which such evidence was deemed to be essential to the due administration of military justice. And this even against the objection of the accused, who 'could not properly be allowed, by pleading guilty, to shut out testimony where the interests of the public service required its introduction.' Of course, where evidence was thus admitted, the accused was to be afforded the opportunity of offering rebutting evidence, the testimony on both sides being governed by the usual rules in regard to relevancy &c.[2] These views have been adopted and acted upon in repeated cases published in Department, &c., Orders,[3] and—especially in

1. See G. C. M. O. 37, Dept. of the Mo., 1880, where it is observed by Gen. Pope:—"While the punishment may be fixed, yet testimony is necessary and proper for the consideration of the Reviewing Officer who may, under the powers conferred upon him by law, pardon or mitigate the punishment."

2. DIGEST, 203, 375–6.

3. See G. O. 54, Army of the Potomac, 1861; Do. 91, Id., 1863; Do. 57, Dept. of Washington, 1863; Do. 20, Northern Dept., 1865; Do. 3, Dept. of the N. West, 1864; Do. 52, 58, 91, Dept. of Arkansas, 1864; Do. 24, Dept. of Va., 1865; Do. 81, 114 Dept. of the Mo., 1867; Do. 39, Dept. of the Platte, 1870; Do. 45, Third Mil. Dist., 1868; Do. 4, Fifth Id., 1867. And see Simmons § 553, 1005; Tytler, 238; Macomb 38–9; De Hart, 135. The contrary view, that, where the accused pleads guilty, no evidence can be introduced against his objection, expressed by O'Brien, 250, 251. And see Benét, 95.

ting to cases of desertion to which they are peculiarly applile—have been announced in a recent G. O. of the War Detment.[1]

With the plea of Not Guilty or Guilty begins the Trial proper,[2] ich we now proceed to consider.

G. C. M. O. 69 of 1877.

The *trial* begins "when the jury is charged with the prisoner. rious to this everything that is done is merely preliminary." McFad- *v.* Com., 23 Pa. St. 12.

CHAPTER XVII.

THE TRIAL.

Supposing all preliminary objections, motions, and spec pleas, if any, to have been disposed of, and the accused to h pleaded 'not guilty' to at least a portion of the charges a specifications,—all is now prepared for the Trial on the mer and this subject will be considered in the present Chapter un the following heads:—I. The hours of session of the co II. The Opening of the prosecution or defence; III. The g eral course of proceeding; IV. The Defence; V. The conclu Statement; VI. Contempts. The important subject of Evide will be presented in a separate Chapter.

I. THE HOURS OF SESSION OF THE COURT.

The Law on the Subject. This subject is regulated by A 94 of the code, as follows:—"*Proceedings of trials shall be carr on only between the hours of eight in the morning and three in t afternoon, excepting in cases which, in the opinion of the offi appointing the court, require immediate example.*"

Purpose of the Article. The object of this statute, whi dates in our law from the Articles of 1775, and is but a modif form of a similar provision in the first Mutiny Act, is, as plained by military writers,[1] to prevent the daily attendance up the trial from being too protracted and onerous, to obviate h action on the part of the court, and to afford an opportunity the judge advocate to write up the daily record. In an opin of an Attorney General,[2] it is represented as a purpose of Article, "to guard against improper secrecy," *i. e.* by preclud

1. Hough, 377; Coppée, 50.
2. XI Opins., 141.

rts-martial from sitting during hours when their proceedings ıld not readily be subject to public scrutiny.

ts Legal Effect. The provision of the Article, being con-d to "proceedings of trials," is not to be extended to action en by the court which is not properly a part of the trial. us it has been held that the fact that a court entertained a *tion to adjourn* after three o'clock p. m. did not constitute a lation on its part of the injunction of the statute.[1] As a rule procedure on the *trial*, however, the Article is mandatory.[2] ıile a court is not *required* to sit during the entire period be-:en the hours specified, and may, on any day of its sessions, :n later than eight o'clock a. m., or close earlier than three lock p. m., yet, in the absence of the specific authority indi-ed in the last clause, it cannot properly sit outside of the ·ignated limits, and, if it does so, its proceedings, while not, the opinion of the author, legally invalidated, are necessarily :gular, and the members of the court are amenable to jus-: for a disregard of the statutory direction:[3] their proceed-;s and sentences also are liable to be formally disapproved the reviewing officer, if the objection is deemed sufficiently terial.[4] Strictly indeed it is only those portions of the testi-ny or proceedings of trials which are had without the hours ned that are affected, and if such testimony or proceedings . afterwards be repeated and gone through with *de novo*, with-the proper hours, the defect in the action of the court may be ıedied.[5] It is also only where the record shows affirmatively t the legal hours were disregarded by the court that the pro-

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. DIGEST, 78.

. Hough, 377; DIGEST, 77. Hough, (p. 378,) observes: "All :ers are supposed to regulate their watches by the time of head-ırters, and by such should a court, I apprehend, be regulated in their ceedings." The uncompleted proceeding, whatever its nature, uld be at once interrupted at the fixed hour. Thus Hough, (p. 192,) :s a case where—"three o'clock striking, the court adjourned in the st of its deliberations," (on the *sentence.*)

. Hough, (p. 386,) cites a case of a convening and reviewing officer victed upon charges of permitting a court-martial to carry on its pro-lings after 3 p. m., and of approving and executing a sentence then dged; and sentenced to be reprimanded.

See cases of such disapproval in G. O. 2, Dept. of the South, 1873; 94, Dept. of the Gulf, 1864; S. O., 281, Dept. of Washington, 1861.

Compare case cited by Hough, 378; Id., (P.) 31, 787; Hughes, 168.

ceedings are, so far forth, to be treated as irregular and liable disapproval.[1] It is not *required* in the Article or elsewhere t the record shall specifically set forth the hours of assembling a adjournment, and, where none are stated, it will properly be p sumed, in favor of the official record, (in the absence of cl proof to the contrary,) that the injunction of the Article h been duly observed by the court.[2]

Excepted Cases. The Article, in its last clause, in exce ing from its general operation, "*cases which, in the opinion the officer appointing the court, require immediate examp* confers upon such officer a discretion similar to that vested him by Arts. 75 and 79, for fixing the number and rank of t members.[3] The exception may be said to refer mainly to ca where, by reason of some such condition as the pressure of bu ness upon the court or of other duties upon the members, t need of prompt discipline in the command, the gravity or pec liar circumstances of the offence or offences to be tried, or t exigencies of war or of the service, it is deemed desirable t the proceedings should be especially expedited. The term "i *mediate example*" has been variously construed by convene officers—by some quite strictly and by others much more free As all cases of military offences, referred after due investigati to courts-martial for trial, may be said in a general sense to r quire immediate example, *i. e.* to call for as speedy justice as c reasonably be administered, a broad interpretation of the te employed and liberal use of the discretion reposed by the Arti are believed by the author to be in general justified. No case known to have occurred in our service where the abuse, to t prejudice of the accused or of justice, of such discretion, has be made the occasion of a military charge.

Form of Authorizing Disregard of stated Hours. to the form for the exercise of the discretion, and for authoriz the court to commence or continue its daily proceedings in pendently of the general restriction of the Article—this, in c service is almost invariably given in one particular mode, *viz.*

1 [illegible]

2 As to the presumption in favor of the regularity of judicial ceedings see [illegible] § [illegible]

3 See De Hart [illegible]

ection added in the convening order, or in a subsequent order ed pending the trial,[1] (for the authority may be given at any e at which an occasion for it may be deemed to have arisen,) : "the court will sit without regard to hours," or "is author- l to sit without regard to hours," or in words to such effect.

A Provision liable to Objection. Whether this Article has proved rather embarrassing than advantageous in practice is uestion which has been considerably discussed. In the report he Committee on the Judiciary of the Senate, of February 18, 5, heretofore cited, it is observed as follows:—"The com- tee also thinks that it will be expedient to amend Article 94 the Articles of war, so as to provide that the court-martial ll have power to regulate the time and duration of its daily ings."

THE OPENING OF THE PROSECUTION OR DEFENCE.

his proceeding, by which the introduction of the testimony y be prefaced, is not common in our practice, and openings even more rarely made by the accused than by the prosecution. opening is indeed much less called for before a court-martial, re the proceedings are in general simple and summary, than ore a civil jury. In complicated cases, however, as where re are numerous charges or specifications, it may be of con- rable advantage, both to the parties and the court, for the ge advocate, prior to entering upon the evidence for the prose- ion, to present, orally, or by reading from a writing, a brief ement of the testimony proposed to be offered to establish the eral charges and of the principles of law deemed applicable to case. In so doing, he may read from law books, published l opinions, &c. He will properly be careful not to misrepre- : the evidence—stating only what facts can be proved—and cially not to attempt to create in advance an unfair impres- l against the accused. Argument also is out of place here should be postponed till the final address. Subject to these rictions, a clear and compact statement of the facts and the on the part of the prosecution, by rendering the issues in-

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See the order issued toward the conclusion of Gen. F. J. Porter's (in time of war, 1862–3,) for the purpose of expediting the pro- ngs. Printed Trial, p. 209.

telligible from the outset, may materially simplify and facilit the investigation and contribute to the exclusion of collate and irrelevant matter, and an opening of this character would advised in all cases of difficulty and importance. And so of opening on the part of the accused, where the defence promis to be an elaborate one, involving the examination of numero witnesses or an extended discussion of points of law.[1]

III. THE GENERAL COURSE OF PROCEEDING.

Separation and Exclusion of Witnesses. In order guard against collusion between witnesses, as well as the unco scious coloring of his testimony to which a witness is liable listening to the statements of previous witnesses as to the s part of the case, it is the usage upon military as upon civil tri to separate the witnesses by excluding from the court-room at t outset of the trial all except the one about to testify, and sub quently permitting only those to be present who have fully giv their evidence. The judge advocate, at the beginning, gener and properly, notifies the witnesses to remain in an ante-room outside the court-room, to await being called in, each in his t When this has not been done, the President, as the organ of court, will ordinarily preface the hearing by a similar directi Where the precaution has been omitted, either party may, at t or a later stage, bring the fact, that witnesses who have not been examined are present, to the attention of the court, wh will thereupon properly order them to withdraw. The rule of e clusion should embrace *all* the witnesses, and not merely those the party whose side of the case is about to be presented. should be enforced by the court, upon its own motion or at t instance of either party, at all stages of the trial, so that witness or witnesses yet to testify, who may be discovered to h come into the court-room, through ignorance or disregard of t preliminary direction, may be at once sent out.

In civil cases the witnesses are sometimes also cautioned the court not to converse together or with other persons u

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[1] On the subject of the Opening see 1 Bishop, C. P. § 967-[illegible] [illegible] Simmons § 57[illegible]. O'Brien, 252; De H[illegible] [illegible] more frequently in the [illegible] cases. See [illegible] Col. Bache, p. 24. A later [illegible] found in the Trial of Capt. H[illegible] p. [illegible]

of their testimony. By military courts a direction
ft is rarely given, but in a case of importance, which
l public interest and become matter of common talk,
ning would not be out of place.
:, it may be added, has been extended, in the civil
cases where, at the trial, a discussion has arisen upon
ny or proposed testimony of a witness under examina-
:, on motion of either party, a court-martial, like a
will, ordinarily and properly, cause the witness to
ending the argument.
so be noted that a witness who, having been examined,
l to be re-examined at a subsequent stage, or to be
witness by the other side, will properly be directed to
of the hearing of the other witnesses till again called
le properly applying to all witnesses who have not
discharged as such.
ess, though notified to retire, has remained in court
examination of a previous witness, while he may—if
person—be amenable to a charge under Art. 62, he is
ified from testifying; his credibility only, not his com-
ing affected.
eneral rule of exclusion certain classes of witnesses have
ized as exceptions. These are those summoned as
o must often necessarily hear the evidence which pre-
own as a basis for forming their opinions; those called
s to *character* only; and further any person intended
as a witness who may be present in the capacity of a
the court, judge advocate, or *counsel*. The *prosecuting*
generally permitted to remain in court, but not till
s himself fully testified.[1]

ction and Hearing of the Testimony. The judge
ow proceeds to introduce and examine his witnesses,
cross-examination on the part of the accused, and also
h depositions and written evidence as he may have to

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subject of this title see 1 Greenl. Ev. § 432; 1 Bishop, C.
93; U. S. *v.* Cole, 5 McLean, 529; State *v.* Zellers, 2 Halst.
v. Hersey, 2 Allen, 176; McLean *v.* State, 16 Ala. 672;
State, 27 Ga. 288; Southey *v.* Nash, 7 C. & P. 632; Regina
8 Id. 297; Gen. Whitelocke's Trial, vol. I, p. 2; Adml.
l, p. 7; Simmons § 569, 942, 943; Tytler, 249; O'Brien,
rt, 148.

exhibit, and having completed his showing announces that the prosecution rests. The accused then produces similarly the proof on his side and similarly rests in conclusion. Evidence in rebuttal may follow on the part of the prosecution, and this, in the discretion of the court, may be succeeded on the part of the accused by evidence in reply to the same.

The hearing cannot legally be interrupted except by a *nolle prosequi* or dissolution ordered by the proper superior.

Qualifying of witnesses. The witnesses, standing with uplifted hand, qualify by taking in open court[1] the form of oath (or affirmation) prescribed in Art. 92. A witness, though he be recalled, or after testifying for one side be required to testify and and in chief for the other, is never sworn but once, *viz.* when he first takes the stand. The Article fails to indicate by whom the oath shall be administered,[2] but, according to the established usage of our service, the witnesses are sworn by the judge advocate; this officer when himself appearing as a witness being sworn by the president.[3] In view of the mandatory injunction of the Article, the form of the oath may not be departed from; but the witness may accompany the form by such additional ceremony as is habitual with persons of his religious sect. Thus Roman Catholics are usually sworn on a copy of the Evangelists, with a cross impressed upon or affixed to it, which is kissed by the witness. Jews are sworn by the five books of Moses, and in being qualified wear their hats. Chinese are now in general sworn, not by the breaking of a saucer,[4] but by the usual form of oath administered through an interpreter who explains it to the witness; and Indian witnesses have been sworn in a similar manner.

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1. See G. O. 1, Div. of the Pacific, 1866, where the swearing and examining of one of the witnesses out of court, and in the absence of the accused, is commented upon as an illegal proceeding.

2. The similar form of oath prescribed by the first Mutiny Act was specifically authorized and directed to be administered by the "Judge Advocate or his Deputy." The Articles of 1776 provided that the oath be administered by the president; those of 1786 that it be administered "by the court." The present form of the statute dates from the Articles of 1806 which was silent as to this particular.

3. A deaf and dumb witness, (having sufficient intelligence to comprehend the obligation,) is sworn through an interpreter. 1 Greenl. Ev. § 366.

4. This was the form observed in the reported case of Regina v. Entrehman, 1 C. & M. 248.

ınd sequence of testimony. Subject to the dis- the several stages of the Examination—the Direct, Re-direct examinations—which are properly to be y apart, the court will in general leave it to the par- advocate and accused—to introduce their witnesses, n testimony, in such sequence as may be found by advantageous or convenient. Further, in its discre- the interests of truth and justice, the court may per- ıl evidence to be introduced by a party quite out of order and place. Thus it may not only admit evi- later period of an examination which should regularly introduced at an earlier, allowing a witness to be re- irect or cross examination upon a question or ques- vertently omitted;[1] but it may permit a case once he part of the prosecution or defence, or on both sides, ened for the introduction of testimony previously discovered since the closing.[2] Even where the party ole with *laches* in not offering the testimony at the e, the court may still permit its subsequent introduc- o material a character that its exclusion will leave the on incomplete. But where new testimony is thus ad- must be admitted subject to the right of the other oss-examine and rebut.[3]

Bishop, C. P. § 966, and cases cited; People *v.* Keith, 50 Simmons § 580; De Hart, 159; G. C. M. O. 47, Dept. of . The court may induce the recalling of a witness for its tion. De Hart, 174.

op, C. P. § 966; R. R. Co. *v.* Steinburg, 17 Mich. 99; Eber- e, 47 Ga. 598; Lang *v.* Waters, 47 Ala. 625. In the lead- 3. G. Harris, (see Printed Trial,) the defence was permitted new evidence after both sides had formally closed and the djourned for two days to give the accused time to prepare ıt. In several military cases evidence has been admitted ıe reading of the final statement of the accused. See G. O. Fla., 1865; Do. 11, Dept. of La., 1869; Do. 149, Dept. of 70; G. C. M. O. 143, Div. Pacific & Dept. of Cal., 1880. Tyder's Trial, (p. 141,) evidence was held admissible, in the the court, after both addresses had been made. Evidence, ich, though material, is merely *cumulative*, should not thus

ses in G. O. 73 of 1829; Do. 31, Dept. of Fla., 1865; Do. La., 1869; Do. 149, Dept. of the Mo., 1870—where the ac- ourt in refusing this right to the accused is disapproved.

Examination by the court. While it is no part of th province of the court to conduct either the prosecution or th defence, it is open to any member to put questions to the wi nesses for either side. But this, though it may be done at an stage of a protracted examination where some matter, whic may be forgotten if not noticed at the moment, has not bee made quite clear by the witness, is in general postponed unt both the parties have concluded their examinations, and is the resorted to for the purpose only or mainly of the elucidation some part of the testimony which has been left obscure.[1] member may also suggest a question to be put by the judge a vocate or accused where he has omitted to elicit some materi particular. Further, while the court cannot legally "originate evidence,[2] *i. e.* take the initiative in providing any part of th proofs, yet where, with a view to a more thorough investigati of the case, it desires to hear certain evidence not introduced either party, it may properly call upon the judge advocate to p cure the same if practicable, adjourning for a reasonable period allow time for the purpose. New testimony thus elicited m of course be received subject to cross examination and rebut by the party to whom it is adverse.[3]

The testimony to be in open court. All testimo whether oral or written, and whether upon the main or interlocutory issue, is to be introduced in open court, and no t timony can be received by the court during a period of delibe tion after it has been cleared.[4] So, where a member of the co has knowledge of material facts in the case, he cannot prope communicate the same privately to the court when cleared

1. Simmons § 577; O'Brien, 253; De Hart, 157; Lieut. Hyder's Tr 143; Gen. Dyer's Court of Inquiry, Part I, 269; G. O. 21, Dept. of Platte, 1866.

2. De Hart, 85; G. O. 11, 17, Dept. of La., 1869.

3. See G. C. M. O. 48, Div. Pacific & Dept. of Cal., 1880.

It may be noted here that the "*confronting*" of witnesses, or causing by the court of two witnesses who contradict each other brought into court together and subjected to further interrogatories a view to reconcile their statements, has been referred to as allow by some authorities. (See Simmons § 944; De Hart, 152; Coppée, It is however a measure of very doubtful expediency, now most if ever resorted to. It was refused to be permitted by the court proposed by the accused on Lieut. Col. Fremont's Trial—pp. 321-

4. See III Opins. At. Gen., 546; also G. O. 1, Div. of the Pacific,

eration, or to the other members, but should cause him-
:o be sworn as a witness on the part of the prosecution or
ıce.

ı the rule that the testimony shall be taken in open court, an
ption has been recognized in a case where a material witness,
norant at the station at which the court is assembled, is un-
through sickness or other disability, to attend, and the exi-
ies or interests of the service do not justify waiting for his
/ery. In such a case the court may temporarily adjourn to
ıuarters or hospital where the witness may be, and receive
:stimony taken in the usual manner.[1]

ıe completing of the testimony not to be interfered

. After the testimony has been entered upon, it cannot, if
rial, properly be allowed to be interrupted, except of course
gh action of the superior authority which created the court,
: form of an order dissolving it or suspending the proceed-
or through the authorized entry of a *nolle prosequi*.[2] The
itself cannot refuse to hear witnesses proposed to be offered
her party, provided they are competent and their testimony
terial[3] and not unreasonably cumulative;[4] nor can a party,
ıy act or objection, shut off the exhibition by the other
of evidence pertinent to the proof of his case. Even an
ed, by escaping from legal custody, after pleading not guilty,
henceforth absenting himself from the court, does not put
d to the trial, but the same proceeds and the prosecution is
leted without regard to his absence.[5]

In such a case the testimony must be taken by the court, *i. e.* as a
: it cannot depute a member or members for the purpose. Adye,
Tytler, 306.

See U. S. *v.* Corrie, 23 Law Rep., 145. As to the proceeding of
prosequi, or withdrawal of a charge, see Chapter XVI.

See the leading case of Emerson Etheridge in G. O. 34, Div. of the
, 1865; also G. O. 21 of 1872; Do. 31, Sixteenth Army Corps, 1863;
ɔ, Dept. of the South, 1871; also G. O. 59, Dept. of Dakota, 1871,
the court is censured for not waiting a reasonable time for material
entary evidence which had been sent for, but proceeding to judg-
vith unreasonable haste and thus prejudicing the interests of justice.

As to the authority of the court to limit the extent of testimony as
racter, see next Chapter.

DIGEST, 205. See Chapter XIX.

The Reading of the Proceedings. A customary part of the routine of a trial is the reading, at the opening of each day's session, of the proceedings and testimony of the previous day, as recorded. At this reading the accused is entitled to be present, but he may waive the right:[1] with his concurrence also a reading may be dispensed with.

Objections—Clearing the Court. Objections, based upon grounds to be indicated in the next Chapter,[2] may be taken by either party to questions or answers in the course of the examination of the witnesses, as also to the admission of written evidence. Objections may also be raised by members of the court, but, as remarked in a General Order,[3] inasmuch as the members occupy the position of judges and not of counsel, and "it is no part of their business to try the case as counsel, the frequent interposition of objections by members is a vicious practice and should be discountenanced."

It has been sometimes asserted that a *party* could not properly object to a question put by a member; but if such a question be one not sanctioned by the law of evidence, no sufficient reason is perceived why an exception taken thereto in a respectful manner should not be entertained and allowed as in a case of a similar question by an adverse party, and this is the view sustained by the weight of authority.[4]

All objections should be *specific;*[5] an objection expressed in general terms only, (as where the party simply says—"I object" without adding his ground,) should not be entertained by the court.

To determine whether an objection is or not valid, the court

1. DIGEST, 219; G. O. 35 of 1867.

2. The ground of the objection should be one recognized at law—that the question is irrelevant or leading, or that the answer is unresponsive, or is an expression of opinion, &c. An objection by a judge advocate to a question, that it was "unnecessary," was condemned. G. O. 42, Dept. of the Platte, 1871.

3. G. C. M. O. 142, Dept. of Dakota, 1881, also cited in Chapter [illegible]

4. A party may object to a question put by a member before "the collective opinion of the court" has been expressed upon it. Simm[illegible] § 575; De Hart, 156.

5. Grounds for objection on the part of the prosecution or a member should be specified in court in the presence of the accused, not left to be stated after the court is cleared. G. C. M. O. 9, Dept. of the East, 1[illegible]

rs, but objections of an unimportant character may of without this formality. The "clearing" of the ır practice is the same in form whether the purpose ɜrate upon a special plea or motion, upon an objec- ence, or upon the finding and sentence. A clearing : resorted to at the instance of the president or at the ı member, when the ruling of the court is desired uestion suggested in the course of the proceedings raised by a party to the trial. In all cases the clear- ed by the president of the court directing all persons judge advocate) to withdraw from the court-room and uded till the doors are again opened. The procedure, f the inconvenience and embarrassment caused to the unsel, clerks and reporters, witnesses and the public, › serious objection. In the French *conseils de guerre*, :s, when desiring to deliberate, themselves retire to a ›m, leaving the officials, counsel and audience in their ıit the return of the court, and incommoding no one. : English practice, as it is remarked by Capt. Hall,[1] instead of clearing the room, sometimes retires to an ›artment to deliberate." In this country, in the case of Bowles *et al.*, by Military Commission in 1864, sion, as it is recorded,[2] "retired to an adjoining room ıtion, to avoid the inconvenience of dismissing the ›embled to listen to the proceedings." In the ab- .y provision of law on the subject, it would be per- and in general desirable upon extended and important ır courts-martial to adopt, where practicable and con- : French form of clearing in lieu of that commonly

ıe court has been cleared for deliberation upon an ıe approved course, after the point has been suffi- ussed, is for the president to put to the vote of the e question—"Shall the objection be sustained?" If ›nly vote in the affirmative, or the vote is a tie,[3] the ; not sustained, and, on the court being re-opened,

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ɜstions for improving the military law," &c. London, 1864,

Trial, p. 73–4.

ıe effect of a *tie vote*, see Chapter XII.

and this result announced, the question, or answer, objec is put or given, and recorded. Otherwise, if the object sustained by a majority vote.

IV. THE DEFENCE.

In General. It is a principle to be scrupulously observ a military trial that the accused, whatever his rank,[1] is not to be deprived of no right but is to be accorded every p privilege—is in no manner to be embarrassed or placed at advantage, but in every reasonable degree facilitated, in m his defence. As heretofore indicated,[2] he is not to be sha or otherwise restrained as to his person, unless it may be sary to prevent escape or violence. If he be under the infl of liquor,[3] or ill, the proceedings should be suspended till sober, well, and master of his faculties. That he may be a oner, under a previous sentence, should not be allowed to prej his defence.[4] On the trial he should be deprived of no ma testimony, reasonably obtainable either by subpœna, ord deposition, whether required to present his original defenc rebut or reply to the testimony of the prosecution,[6] to im its witnesses,[7] to exhibit matters of extenuation,[8] or to esta his own character or record. Subject only to the objectio which all proofs or proceedings are liable, he should be pe ted to conduct the examination and cross-examination o witnesses, and generally to present his defence, in his own without restriction by the court.[9] Subject to a reasonable itation as to evidence of character and evidence purely cu tive, the court should hear his entire material testimony,[10] a

1. Digest, 219.
2. In Chapter XII.
3. See Taffe v. State, 23 Ark. 34.
4. That it can constitute no objection to his being tried, see G. C Dept. of the Pacific, 1864.
5. G. C. M. O. 43 of 1885; G. O. 40, Fourth Mil. Dist., 1869. the court, in a case especially of a soldier, should see that his righ protected by the exclusion of improper testimony. G. C. M. O Dept. of Dakota, 1882.
6. G. C. M. O. 11, Dept. of La., 1862.
7. G. C. M. O. 21 of 1872.
8. G. O. 45, Third Mil. Dist., 1868.
9. Kennedy, 104; Napier, 21.
10. G. O. 36, Dep. of the Tenn., 1865.

where necessary in bringing it fully out. The principle illustrated, that the accused shall be allowed and enabled ake a free and full defence, while of general application, pecially to be regarded in a case where the accused is an ted man without counsel.

ecific Defences—Classification. The prosecution hav- stablished, by *prima facie* evidence, the offence, (or at least of the offences,) charged, the accused is put upon his *defence.* nces are of two sorts, consisting either—1, of proof that the ce charged was not committed by the accused; or—2, of f that though the act alleged was committed by him, it did constitute the offence charged.

A defence of the former class will consist in exhibiting some of facts inconsistent with guilt,—as that the occurrences set in the specification did not take place as alleged, or at all; at the accused did not personally do, or take part in, the act ged; or that he was not present at the alleged place and time commission, but was elsewhere, (*alibi*,) and therefore could ave committed it; or that the offence was actually committed nother person, &c. Defences of this class vary with the isions of the Articles under which the charges are laid and the circumstances in each case, and, except to notice briefly lefence of *alibi*, need not here be considered.[1]

ibi. This defence, when satisfactorily established, is neces- a conclusive answer to the charge. It is however easily cated, and, even when sustained by the testimony of *bona* witnesses, is subject to question by reason of possible and al errors as to dates, hours of the day, identity of persons, it is therefore to be entertained with strictness and caution.[2] erfect *alibi* must cover the whole time when the presence of risoner was required" for the consummation of the offence.[3] re, however, it fails to include the entire period, it is still to ken into consideration, and if sufficient to justify a reason- loubt as to the presence of the accused at the time and place

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As to this class of defences see Chapter XXV, on the Articles of separately considered.

Wharton, Cr. Ev. § 742; 1 Bishop, C. P. § 1064; Chappel *v.* State, l. 92.

Bishop, C. P. § 1067.

of the act, will properly induce an acquittal by the court.[1] Th defence is best tested by a searching cross-examination as to de tails; it may also be rebutted by any facts tending to disprove i and not already in evidence, as, for example, admissions or stat ments of the accused at variance with the claim of *alibi*.[2]

2. The defences of the *second* class are such as consist in proo of an absence of criminal *capacity* or *intent*, by reason mainly of Ignorance of fact or of law, Drunkenness, Insanity, Obedience t orders, Compulsion of the enemy and Requirements of mi itary discipline.

Ignorance of Fact. It is generally laid down that ignoran of fact excuses crime.[3] But this must be an honest or innoce ignorance, and not an ignorance which is the result of carele ness or fault.[4] The theory of course is that where a *bona fi* ignorance of fact exists there must be an absence of the requisi wrongful *intent*. The general rule applies equally to milit cases; and the ignorance, to constitute a defence therein, mu appear not to have proceeded from any want of vigilance, from failure to make the inquiries or obtain the informati reasonably called for by the obligations and usages of the servic Thus an officer who presents a fraudulent claim against th

1. State *v.* Waterman, 1 Nev. 544.

2. 1 Bishop, C. P. § 1068.

3. 3 Greenl. Ev. § 21; 1 Bishop, C. L. § 301.

4. 1 Bishop, C. L. § 302, 313. Simmons, (§ 593,) in treating of th defence, says :—"Ignorance or mistake is a defect of will; when a ma intending to do a lawful act, does that which is unlawful. As if a soldier intending to fire on the enemy, kills some of his own people; or fir by order of his officer at a target, kills a bystander." But this ma be qualified as indicated in the text: the ignorance or mistake in so cases, to constitute a sufficient defence, must be such as could not ha been guarded against by a reasonable prudence: if in an appreciab degree the result of heedlessness, the defence fails.

Akin to this defence is that sometimes distinguished as the defence o Accident—in regard to which it is observed by Blackstone, (4 Com. 27,) as follows: "If any accidental mischief happens to follow from th performance of a *lawful* act, the party stands excused from all gu But if a man be doing anything *unlawful*, and a consequence ensu which he did not foresee or intend, as the death of a man or the lik his want of foresight shall be no excuse; for, being guilty of one offen in doing antecedently what is in itself unlawful, he is criminally gu of whatever consequence may follow the first misbehaviour." The of these statements however must be taken with the qualification abov specified.

ted States without knowing it to be fraudulent, or a soldier ı neglects to report for guard or other duty because ignorant he fact that he has been duly detailed therefor, is not guilty ı breach, in the one case of the 60th, or in the other of the ı Article of war, unless his ignorance is the result of his own gligence or wrong-doing.

Ignorance of Law. On the other hand, it is also a general nciple, founded originally "on the necessities of civil govern-nt,"[1] that an ignorance or mistake of *law* does not excuse me, and it is a legal presumption that "every man is presumed know the laws of the country in which he dwells."[2] In gen-l therefore such ignorance or mistake can have no effect in ing away with the inference, or rebutting the proof, of crim-l intent, and the fact of its existence is inadmissible in evi-nce as a defence.

This principle is equally applicable to military persons so far regards their knowledge of and amenability to the general law the land. Such persons also are generally to be presumed to ve a knowledge of the special laws and regulations governing : army, as well as of the General Orders which have been offi-lly promulgated and of which they are bound from their sition or circumstances to take notice.[3] In the case of *officers* tainly this rule can scarcely admit of an exception; but the estion may sometimes arise how far *enlisted men* are to be urged with a knowledge of the Articles of war.

Ignorance of the code on the part of soldiers. This estion would be based primarily upon the fact that the 2d ticle makes it one of the features of enlistments into the mil-y service that the "Articles of war shall be read to every en-ed man at the time of, or within six days after, his enlist-nt," and then proceeds to enjoin that he shall thereupon take oath in which, among other things, he swears that he will erve and obey military orders "according to the rules and

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. And on a consideration of "the dangerous extent to which the ıse of ignorance might otherwise be carried." 3 Greenl. Ev. § 20, :.

3 Greenl. Ev. § 20; 1 Bishop, C. L. § 294.

See De Hart, 164; Benét, 119.

articles of war."[1] While in the case of an old or re-enlisted sol-dier, or one who had been for a considerable period in the servi and had had a sufficient opportunity to inform himself as to th provisions of the code, a failure to have complied with the in junction of this article could scarcely constitute a defence, su failure might perhaps have this effect, or at least operate as a extenuation, in the case of a recruit, especially one imperfect acquainted with the English language. In such a case it wou certainly be admissible for the accused to show the fact,[2] and the offence charged were one of the criminality of which could not, in his ignorance of military law, have been aware, the gravity of which he could not have appreciated, the omis-sion of the reading of the Articles upon his enlistment wou properly be regarded by the court, if not as a defence, certai as a palliation of his misconduct. In several cases published General Orders, such an omission has induced the court to i pose a light sentence or the reviewing authority to mitigate punishment adjudged.[3]

Drunkenness. The common law, though it does not inf for mere drunkenness, views it as a wrongful act.[4] As obser Bishop,[5] "the law deems it wrong for a man to cloud his mi or excite it to evil action, by the use of intoxicating drinks. Crime therefore, when committed by an individual who has pr viously placed himself under the influence of an intoxicant, committed by one who is in the wrong *ab initio;* hence the

1. In this connection, note also Art. 128, (commented upon in Ch ter XXV,) which requires that the "articles shall be read and publi once in every six months to every garrison, regiment, troop, or comp in the service of the United States."

2. G. C. M. O. 20, Dept. of the East, 1870.

3. G. O. 23, Army of West Va., 1861; Do. 20, Dept. of the Mo., 186 Do. 49, Dept. of the Susquehanna, 1864; G. C. M. O. 73, Dept. of East, 1872; Do. 25, Dept. of Texas, 1874. And see Harcourt, 88.

4. "It is a great offence in itself." Beverly's Case, 4 Coke, 123 And see G. O. 157, Dept. of Va. & No. Ca., 1864. Blackstone re to it as a "crime." Thus he says, (4 Com. 26,) "The law of Engl considering how easy it is to counterfeit this excuse, and how weak excuse it is, (though real,) will not suffer any man thus to privilege crime by another." Story J., in U. S. *v.* Cornell, 2 Mason, 11, m accurately expresses the principle as follows: "The vices of men ca constitute an excuse for their crimes."

5. 1 C. L. § 397

shed general principle that voluntary drunkenness furnishes se no excuse or palliation for criminal acts committed during ontinuance, and no immunity from the penal consequences uch acts.[1]

ut the question whether or not the accused was drunk at the : of the commission of the criminal act may be material as ig to indicate what *species* or *quality* of offence was actually mitted. Thus there are crimes, or instances of crimes, which be consummated only where a peculiar and distinctive intent, a conscious deliberation or premeditation, has concurred with act, which could not well be possessed or entertained by intoxicated person. In such cases evidence of the drunken dition of the party at the time of his commission of the ged crime is held admissible, not to excuse or extenuate the as such, but to aid in determining whether, in view of the e of his mind, such act amounted to the specific crime charged, which of two or more crimes, similar but distinguished in ree, it really was in law. Thus in cases of such offences as eny, robbery, burglary, and passing counterfeit money, which ire for their commission a certain specific intent, evidence of ikenness is admissible as indicating whether the offender was ble of entertaining this intent, or whether his act was any-

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"A man who voluntarily puts himself in a condition to have no :ol of his actions must be held to intend the consequences. The y of the community requires this rule. Intoxication is so easily coun- ited, and, when real, is so often resorted to as a means of nerving erson up to the commission of some desperate act, and is withal so :usable in itself, that the law has never recognized it as an excuse rime." People *v.* Garbutt, 17 Mich. 19. And see Beverly's Case, ke, 123, b.; U. S. *v.* Cornell, 2 Mason, 111; U. S. *v.* Drew, 5 Id. Com. *v.* Hawkins, 3 Gray, 466; Kenny *v.* People, 31 N. Y. 330; shop, C. L. § 400, and cases cited; Harcourt, 54; G. O. 40, 53, y of the Potomac, 1862; Do. 70, Dept. of the East, 1865.

the majority of cases, indeed, drunkenness rather aggravates than iuates crime, *viz.* by adding at least a gross and offensive feature to pecific wrongful act. See G. O. 8, Dept. of the Gulf, 1872; G. C. . 21, Dept. of the East, 1871.

here the intoxication is not voluntary—not induced by the party's act, the principle of responsibility does not apply. Thus, "if a be made drunk by stratagem, or the fraud of another, he is not nsible." Parsons' Case, 2 Lewin, 144. And see U. S. *v.* Rouden- Baldwin, 518. So, where drunkenness is caused by the want of or care of a physician. 1 Bishop, C. L. § 405; 3 Greenl. Ev. § 6; e *v.* Robinson, 2 Park. 236.

thing more than a mere battery, trespass, or mistake.[1] So, upo an indictment for murder, testimony as to the inebriation of th accused at the time of the killing may ordinarily properly b admitted as indicating a mental excitement, confusion, or unco sciousness, incompatible under the circumstances of the case wi premeditation or a deliberate intent to take life, and as reduci the crime to the grade of manslaughter, or—where such offence is created by the State statute—of murder in the seco (or other) degree.[2] On the other hand, where, to constitute th legal crime, there is required no peculiar intent—no wrongf intent other than that inferable from the act itself—as in ca of assault and battery, rape, or arson, evidence that the offend was intoxicated would, strictly, not be admissible in defence.[3]

In *military* cases, the fact of the drunkenness of the accuse as indicating his state of mind at the time of the alleged offenc whether it may be considered as properly affecting the issue to b tried or only the measure of punishment to be adjudged in th event of conviction, is in practice always admitted in evidenc And where a deliberate purpose or peculiar intent is necessary constitute the offence, as in cases of disobedience of orders violation of Art. 21, desertion, mutiny, cowardice, or fraud

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1. U. S. *v.* Roudenbush, Baldwin, 514; Rex *v.* Pitman, 2 C. & 423; Com. *v.* French, Thach. 163; Pigman *v.* State, 14 Ohio, 55 Nichols *v.* State, 8 Ohio St. 435; State *v.* Schingen, 20 Wis. 74; St *v.* Bell, 29 Iowa, 316; Mooney *v.* State, 33 Ala. 420; People *v.* Ham 29 Cal. 701; 1 Bishop, C. L. § 408–414.

2. Hoyt *v.* People, 104 U. S. 931; State *v.* Johnson, 40 Conn. 1 and 41 Id. 588; People *v.* Rogers, 18 N. Y. 9; People *v.* Hammill, Park. 223; People *v.* Robinson, Id. 235; Friery *v.* People, 54 Ba 319; State *v.* McCants, 1 Speers, 384; Kelley *v.* State, 3 Sm. & 518; Shannahan *v.* Com., 8 Bush, 463; Swan *v.* State, 4 Humph. 1 People *v.* Belencia, 21 Cal. 544; People *v.* Williams, 43 Id. 344; Greenl. Ev. § 6, 148; 1 Bishop, C. L. § 401, 409.

To constitute, however, a defence, the mere fact that the party w *under the influence* of liquor is not sufficient. A person in some degr under such influence may nevertheless be capable of conceiving a sp cific design and of acting with premeditation. If so capable, he must presumed, like a sober man, to have intended the natural and legitim consequences of his act. Friery *v.* People; People *v.* Belencia, *ante*.

Where a person is too drunk to entertain the specific intent pecu to a certain crime, his drunkenness will constitute equally a defence the charge of an *attempt* to commit it. 1 Bishop, C. L. § 413.

3. See People *v.* King, 27 Cal. 514; Ferrell *v.* State, 43 Texas, 9

4. DIGEST, 247.

ıtion of Art. 60, the drunkenness, if clearly shown in evi-
:e to have been such as to have incapacitated the party from
rtaining such purpose or intent, will ordinarily properly be
:ed as constituting a legal defence to the specific act charged.
ıch cases, however, if the drunken act has involved a dis-
r or neglect of duty prejudicial to good order and military
ipline—and such will commonly be the fact[1]—the accused
· be convicted of an offence under Art. 62, thus incurring
ıe adequate punishment.

t is to be noted that drunkenness, to be admitted in evidence,
o constitute a defence, need not be caused by indulgence in
ituous liquors, but may, with the same effect, result from the
untary excessive use of an intoxicating drug.[2]

The effect, as a defence, of drunkenness when so extreme as to
uce a condition of *insanity* will be noticed under the next head.

nsanity. Insanity is a disease so perverting the reason or
al sense or both as to render a person not accountable for his
. It is an exceptional and abnormal status, (to be established
eneral by the testimony of medical experts,[3]) and as the law
umes a man to be sane till he is proved to be the contrary,
burden of maintaining insanity as a defence in a criminal case
of course upon the accused.[4] To constitute a defence on
ground of insanity it may be made to appear, on the one
l either that the accused, in committing the offence, did not,
mental derangement, comprehend the nature of what he was
g, or did not know that he was doing wrong;[5] or, on the

Some writers express themselves in general terms to the effect that
kenness is in itself a breach of military discipline.' See Simmons,
t; Hough, (P.) 86; Harcourt, 56; Napier, 181; Hickman, 130.
tainly can rarely fail to be so when committed in camp or at a
ıry post.

DIGEST, 247. And see late case in G. C. M. O. 49 of 1883.

Real *v.* People, 55 Barb. 551; G. O. 91, Army of the Potomac,

If enough, however, is shown on the part of the accused, to induce
on the whole evidence—a reasonable doubt of his sanity, he is en-
to an acquittal. Hopps *v.* People, 31 Ills. 385; Chase *v.* People,
. 353. Otherwise if a mere doubt or possibility only is raised.
h *v.* Com., 77 Pa. St. 205.

McNaghten's Case, 10 Clark & Fin. 210; Com. *v.* Rogers, 7 Met.
Com. *v.* Mosler, 4 Barr, 264; People *v.* Klein, Edmonds, 13; State
nger, 43 Mo. 127.

other hand, that, though aware of the nature and consequenc of his act, as well as of its wrongfulness or its illegality, he w prompted by such an uncontrollable impulse as not to be a fr agent.[1]

Insanity may be general or partial. It may consist of an enti or almost entire dispossession of the reason, or of some delusi or hallucination only[2] or of a monomania.[3] A partial insanity no defence where it relates to persons or things not connecte with the crime charged.[4] Insanity may also be permanent, intermittent or temporary. If the party has lucid intervals wh he is free from the disease, he will be responsible for crimin acts committed in such intervals.[5] If at the date of the cri he has quite recovered from a previous derangement, he will held accountable as if such derangement had never occurre But the recovery must be clearly shown, otherwise the presum tion of law will govern—that insanity once existing has contin to exist.[6]

Insanity of whatever sort must, to constitute a defence, absolute. No mere caprice or eccentricity, however arbitrary extravagant, can be accepted as an excuse for crime.[7]

Insanity may be a defence though resulting solely from into

1. See Com. *v.* Rogers, *ante;* U. S. *v.* Guiteau, 1 Mackey, 498.

2. "Where the delusion of the party is such that he has a real firm belief of the existence of a fact which is wholly imaginary, under that insane belief he does an act which would be justifiable if fact existed, he is not responsible for such act." Com. *v.* Roger Met. 500. "He must be considered in the same situation as to resp sibility as if the facts with respect to which the delusion exists were re McNaghten's Case, 10 Clark & Fin. 211.

3. Such as *homicidal mania*—a morbid propensity to kill; *kle mania*—a morbid propensity to steal; *pyromania*—a morbid incend propensity; *pseudomania*—a morbid propensity to falsify; and o manias now well recognized in medical jurisprudence. See Wharto Stillé § 185.

4. State *v.* Spencer, 1 Zabr. 196; Com. *v.* Mosler, 4 Barr, 266; yard *v.* State, 30 Miss. 600.

5. "It is all one whether the phrenzy be fixed and permanent whether it were temporary by force of any disease, if the fact were c mitted while the party were under that distemper." 1 Hale, P. C.

6. State *v.* Spencer, 1 Zabr. 210. But it is only established per nent insanity which the law presumes to continue till the contrary shown; not so with spasmodic or temporary mania. People *v.* Fr 38 Cal. 183.

7. 1 Russell, 13; Com. *v.* Haskell, 3 Brewst. 491.

tion. But such an insanity, to relieve from criminal responsi-
lity, must amount to a fixed mental derangement or delirium ex-
ing at the time of the act, and incapacitating the party either to
preciate its wrongfulness or to resist the impulse to commit it.[1]
In military cases, insanity is not a common *defence*, though the
aim is not unfrequently advanced by soldiers, in *extenuation*
an offence charged, that their brain has been affected by a pre-
ous wound or other injury. Where the defence is actually set
, it should be duly entertained and allowed to be supported by
idence, however improbable it may apparently be.[2] Where
sanity or mental incapacity has been shown or indicated on the
fence, the court has in some cases proceeded to sentence, ac-
mpanying such action with a recommendation that the sentence
remitted or that its execution be suspended till the question
sanity can be more fully investigated;[3] in other cases it has
und the accused guilty without criminality attached on the
pressed ground of his mental condition;[4] the preferable form
simply to *acquit* on this ground.[5]
If at the arraignment, or pending the trial, the accused, though
t alleging it as a defence, manifests insanity or imbecility, the

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1. 3 Greenl. Ev. § 6; 1 Bishop, C. L. § 400, 406; Lanergan *v.* People,
Barb. 277; Com. *v.* Crozier, 1 Brewst. 349; Bailey *v.* State, 26
d. 422; Bradley *v.* State, 31 Ind. 492; Tyra *v.* Com., 2 Met. (Ky.)
People *v.* Ferriss, 55 Cal. 588; State *v.* Till, 1 Houston, 233, 511.
It may be remarked that a party cannot be held accountable for acts
mmitted while in a condition of excessive intoxication or unnatural
citement brought on by no fault of his own. Thus Hale, (1 P. C.
.) observes: "If a person, by the unskilfulness of his physician, or by
e contrivance of his enemies, eat or drink such a thing as causeth
ch a temporary or permanent phrenzy as *aconitum* or *nux vomica*,
s puts him into the same condition in reference to crimes as any other
renzy and equally excuseth him."

2. In a peculiar case in G. O. 29, Div. of the Atlantic, 1874, in which
e court refused to entertain this defence on the ground that the ac-
sed was personally known to a majority of the court who considered
emselves competent to judge of his sanity without evidence, Gen. Han-
ck disapproved of the proceedings as a method of disposing of a de-
ce "unknown to the administration of justice," as well as at vari-
ce with the oath of the members to 'determine according to *evidence*.'

3. G. O. 62, 73, First Mil. Dist., 1867; Do. 1, Div. of the Pacific, 1872.

4. G. O. 13, Northern Dept., 1864. And see cases in G. O. 46 of
4 and 36 of 1825, where the accused is convicted, but, on account of
ntal derangement or idiocy, is not sentenced but recommended to be
charged. See also Hickman, 215.

5. See Simmons § 590; Kennedy, 195; O'Brien, 266.

court should suspend proceedings and investigate his conditi reporting the result to the commander;[1] or, preferably, sim report to him the apparent fact, for such investigation or ot action as he may see fit to institute.

Obedience to Orders. That the act charged as an offe was done in obedience to the order—verbal or written[2]—o military superior, is, in general, a good defence at military lav The act, however, must have been *duly* done—must not h been either wanton or in excess of the authority or discre conferred by the order. Thus an officer or soldier ordere suppress a mutiny or disorder or to make an arrest, a guard dered to keep in custody a prisoner, or a sentinel ordere prevent persons from passing his post, will not be justifie taking life or in resorting to extreme violence, where the ol of the order can be effectually accomplished by more mod and customary means: otherwise where the forcible resist of the party, his persistence in disregarding warnings, his su flight, &c., render it impracticable to seize or stop him wit extreme violence or the use of a deadly weapon.[4]

Further the order, to constitute a defence, must be a *legal* It must emanate from a proper officer—a superior authoriz give it—and it must command a thing not in itself unlawf prohibited by law. In other words, it must be an order v the inferior is bound to obey. While obedience by inferi the fundamental principle of the military service, it is yt quired to be rendered only to a lawful order.[6] It is "the l

1. G. O. 10, Dept. of the Gulf, 1866; G. C. M. O. 39, Dept. Mo., 1868. And compare People *v.* Ah Ying, 42 Cal. 19.

2. See Pollard *v.* Baldwin, 22 Iowa, 328. So, no particular fo words is required if the order is so expressed as to be intelligible. *v.* Small and State *v.* Hill, Smith's Reports of Decisions in Militia pp. 57, 83.

3. Simmons § 594; Bombay R., 16; DeHart, 165; Benét, 119.

4. See DIGEST, 314; and compare title "Requirements of m discipline," *post*, and authorities cited thereunder; also civil cases under PART III, *post*.

Where the exceeding of the order was only the result of an ex zeal, the offence was held to be extenuated. G. O. 5, Dept. of 1866.

5. DIGEST, 9. See adjudged cases illustrating this principle under PART III, *post*.

6. See Chapter XXV—TWENTY-FIRST ARTICLE.

s of the superiors appointed over them" that "all inferiors" ›y par. 1 of the Army Regulations, "required to obey strictly ɔ execute with alacrity and good faith;" and it is the "law- mmand of his superior officer" which, by the 21st Article r, "any officer of soldier" may be punished even with for disobeying. But for the inferior to assume to deter- the question of the lawfulness of an order given him by a or would of itself, as a general rule, amount to insubordina- nd such an assumption carried into practice would subvert ry discipline.[1] Where the order is apparently regular and on its face, he is not to go behind it to satisfy himself is superior has proceeded with authority, but is to obey it ing to its terms, the only exceptions recognized to the rule lience being cases of orders so manifestly beyond the legal or discretion of the commander as to admit of no rational of their unlawfulness.[2] Such would be a command to a specific law of the land or an established custom or ı law of the military service, or an arbitrary command im- an obligation not justified by law or usage,[3] or a command ı thing wholly irregular and improper given by a superior incapacitated by intoxication or otherwise to perform his Except in such instances of palpable illegality, which

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ı II Opins. 713, the Attorney General, referring to a certain mil- :der, held to be legal, says: "It is not for the subordinate officer ceives it to judge of the fitness or legality of such order; for the ıst be an extreme one which would justify him in refusing obedi- In a leading case in the *navy*, Dinsman *v.* Wilkes, 7 Howard, e Supreme Court observes: "There would be an end of all dis- if the seamen and marines on board a ship of war on a distant were permitted to act upon their own opinion of their rights, and w off the authority of the commander whenever they supposed it nlawfully exercised."

ıy be noted that the ruling in an adjudged *militia* case, State *v.* nan, Smith's Reports of Decisions, 25, that, to entitle a superior ›bedience of his inferior, "his command must be lawful *and rea-* ," could scarcely be accepted as good law for the army.

soldier is justified in law in obeying all orders of his commanding "unless they are obviously, and in a manner patent to common llegal." Forsyth, Const. Law, 216. And see DIGEST, 9; Tul- ; O'Brien, 83; De Hart, 166; Desty, Am. C. L., 20 *a*; Des- Olney, 1 Curtis, 306; Riggs *v.* State, 3 Cold. 85. And compare · XXV—TWENTY-FIRST ARTICLE.

ch as the order to a soldier to take his clothes to be washed by ılar laundress, held illegal in G. C. M. O. 87, Dept. of the East,

must be of rare occurrence, the inferior should presume that the order was lawful and authorized[1] and obey it accordingly, and in obeying it he can scarcely fail to be held justified by a military court.[2]

It may be added that an order which might not be regarded as legal in time of peace, may furnish to the inferior obeying it a complete defence in time of *war*, as being warranted by the law and usages of war. This point, as also this Title in general, will be illustrated in treating of the *civil amenability* of military persons, in PART III of this work.

Compulsion of the Enemy, &c. This defence, as establishing an absence of criminal capacity, is recognized as valid in cases of persons charged with having joined the public enemy in war, or with having associated themselves with rebels, mutineers, and the like, and who claim to have done so through compulsion or inevitable necessity. But it is held in the adjudged cases on the subject that such defence can be sustained by nothing short of proof of an immediate danger of death threatened by the enemy or other compelling party; that neither a menace nor impending danger of bodily injury less than loss of life, nor a well-founded apprehension of pecuniary loss or injury to property, will amount to a justification in law.[3] Military courts indeed might feel warranted in relaxing this strict rule in special cases, as it was in fact relaxed in certain extreme cases of prisoners of war charged with desertion to the enemy in the late war.[4] It is to be added that even where the compulsion has originally so overpowered the will of the party as to constitute

1. See G. O. 34 of 1852, where the general rule is laid down by the Secretary of War, (Mr. Conrad,) that an inferior "should act upon the reasonable presumption that his superior was authorized to issue an order which he *might* be authorized to issue. If he acts otherwise, he does so at his peril, and subjects himself to the risk of being punished for disobedience of orders."

2. In a case of an act done under an order admitting of question as to its legality or authority, the inferior who executed it will be more readily justified than the superior who originated the order. See G. O. 27, Dept. of Pa., 1865; McCall *v.* McDowell, Deady, 233.

3. See McGrowther's Case, Foster, 14; Oldcastle's Case, 1 Hale, P. C. 50; Respublica *v.* McCarthy, 2 Dallas, 87; U. S. *v.* Vigol, Id. 346; U. S. *v.* Hodges, 2 Wheeler, Cr. Cas., 477; U. S. *v.* Griner, 4 Pet. 396, 401; Simmons § 597.

4. DIGEST, 395.

justification, he may yet forfeit his right to have it allowed defence, by voluntarily remaining and acting with the y, &c., notwithstanding opportunity of escape has been d.[1]

uirements of Military Discipline. As an inferior may l on the ground that his alleged offence was committed in edience to a legal order of a superior, so a *superior*, when d with some extreme violence or severity toward an in- may claim in defence that his alleged act was justified by uirements of military discipline. This defence, however, not be accepted as sufficient by a court-martial except in where it clearly and satisfactorily appears that the insubor- on, criminal attempt, or misconduct of the inferior, could ve been repressed or prevented without a resort to the ex- measure which is the material of the charge. In practice iking or otherwise assaulting of soldiers, as well as the in- upon them of summary and unauthorized punishments, cers, have repeatedly been made the occasion of trials by martial, and where not proved to be fully justified by the ds of discipline have induced severe sentences, or, if not isited by the courts, (which in some instances have shown elves too indulgent to the accused,) have called forth severe ation from the reviewing commanders.[2] Personal violence ved by an officer against a soldier, by the use of the fist, ord or otherwise, is always an extreme measure and must ute a serious military offence when resorted to in a case an emphatic and dignified command, or an immediate ar-

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The force and fear must continue all the time the party remains e rebels. It is incumbent on every man who makes force his de- show an actual force, and that he quitted the service as soon as he McGrowther's Case, *ante*. "Those that supplied with victuals n Oldcastle and his accomplices then in rebellion were acquitted judgment of the Court, because it was found to be done *pro timore et quod recesserunt quam cito potuerunt.*" 1 Hale, P. C. 50. e Respublica *v.* McCarthy, *ante;* DIGEST, 395.

e G. O. 81 of 1822; Do. 28 of 1829; Do. 47 of 1830; Do. 64 of Do. 34, 53 of 1842; Do. 2, 4, 6, 17, 68 of 1843; Do. 2, 39 of G. C. M. O. 645 of 1865; Do. 80 of 1875; G. O. 53, Dept. of No. Ca., 1864; Do. 22, Dept. of the Platte, 1867; Do. 40, f the East, 1868; Do. 9, Div. of the Atlantic, 1869; Do. 5, Id., Do. 50, Dept. of the Mo., 1871; Do. 93, Dept. of the South, lso Chapter X—"Disciplinary Punishments."

rest ordered, would have put an end to the insubord And the principle governing such cases is of course to b with especial strictness to those in which, in the enforc discipline, life has been taken.[2] In all cases indeed of t eral class it should be satisfactorily established that the imperatively called for by the necessities of discipline at t that to all appearance, or in all reasonable probability, t neer or rioter could not have been repressed, the escaping or prisoner recaptured, the assailant subdued, or the in nate inferior restrained or made subordinate, by any less measure than that actually employed.[3] Otherwise the should not be accepted as sufficient. And in time of p superior should be held to the strictest responsibility.[4]

V. THE CONCLUDING STATEMENT.

Of what it Consists. The testimony on both side concluded, either party or both parties—the accused *first* and the judge advocate *after* him—may present a closing ment" or address to the court, which may be oral but monly read from a writing. While, strictly, the closing argument, as of the proof, belongs to the party who has the ative of the issue,[5] the order indicated is that now in observed in the practice of our courts-martial, whatever nature of the defence, if any, which may have been made

1. See cases in the following Orders in which officers have b to account for the unjustifiable striking, &c., of soldiers:—G. O. 64 Do. 4, 6, 68 of 1843; Do. 2, 39 of 1844; Do. 53, Dept. of Va Ca., 1864; Do. 22, Dept. of the Platte, 1867; Do. 9, Div. of th tic, 1869; Do. 5, Id., 1870.

2. See cases of officers dismissed, &c., for unjustifiably taking of inferiors,—in G. C. M. O. 14 of 1871; Do. 28 of 1873; Do. 47 Do. 112, Dept. of the East, 1870; G. O. 87, Northern Dept., 1 39, 56, Dept. of the Susquehanna, 1864; Do. 44, Dept. of W 1864; Do. 7, Dept. of Pa., 1865; Do. 17, Dept. of Ky., 1865; Dept. of So. Ca., 1865; Do. 25, Dept. of La., 1866; Do. 89, Sec Dist., 1868. And compare U. S. *v.* Carr, 1 Woods, 480; Lieu age's Case, Hickman, 197–9; Cases of Maxwell and Porteous, I gast, 162–7.

3. See DIGEST, 314.

4. DIGEST, 314. And see, on this general subject, Chapter X ciplinary Punishments."

5. Millerd *v.* Thorn, 56 N. Y. 402.

6. DIGEST, 457–8. Either party, or both parties, may w right to make a statement. Id., 458.

ement, if in writing, is attached to the record as an exhibit; erbal, it is generally entered in the body of the record,[1] in words, as nearly as they can be given, of the party. The ement may consist of a brief summary or version of the evi-e, with such explanation, or allegation of motive, excuse, ter of extenuation, &c., as the party may desire to offer, or ay embrace, with the facts, a presentation also of the law of case and an argument both upon the facts and the law.

ts **Privilege.** A very considerable freedom is allowable here hin certain limits.[2] The accused, for example, in his state-nt may sharply criticize the testimony as given by the adverse nesses, and their apparent or supposed *animus* in giving it, as ll as the conduct, motives, &c., of the persons through whose s or at whose instance he has been brought to trial, and es-ially those of the actual prosecutor or responsible accuser. d evidence of malice on the part of the latter will justify an reased asperity of comment. But between animadversion of s character and defamatory personalities a line should be wn, and the latter should not be permitted. Further, a proper sideration for the discipline and established military relations he service should exclude from the statement gratuitously dis-ectful language toward superiors or the court, as well as any n of insubordination and defiance of authority.[3] But within e limitations the court will rarely be called upon to check the used, who, under the critical circumstances in which he is ed, should certainly be allowed the largest latitude of expres-n consistent with the observance of the conditions mentioned,

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G. O. 4, Dept. of N. Mex., 1864.

See Tytler, 302; Simmons § 587; Pipon & Col. 55; Macomb, 45. O'Brien, 258, 262; De Hart, 160; Benét, 116; Coppée, 82; DIGEST, ; G. O. 16 of 1851; Do. 31, Div. of the Atlantic, 1873.

It is well remarked by the Secretary of War in G. O. 25 of 1859 t the statement cannot be allowed to 'serve as a cover for language ounting to a breach of military discipline.' The use in the statement unseemly and unmilitary language has been severely commented upon courts in connection with their findings, (see G. O. of May 10, 1816; ut. Hyder's Trial, p. 156,) and still more frequently by reviewing cers. G. O. 3 of 1826; Do. 64 of 1827; Do. 16 of 1851; Do. 2 of 6; Do. 3, Army of the Potomac, 1861; Do. 6, Dept. of La., 1869; Do. 36, Middle Dept., 1864; Do. 52, Dept. of the Cumberland, 1868, hich—as in some other cases, see *post*—the court is declared to erred in receiving the paper, or allowing it to be read.

the non-observance of which indeed could give no addit[illegible] force to the address.[1]

Where the statement manifestly exceeds a reasonable free[illegible] and offends in either of the particulars above indicated, the [illegible] may properly warn the accused that he is transcending the [illegible]prieties, and if he persists and does not withdraw the objec[illegible]able portion, may refuse to allow him to proceed or to admit [illegible] statement into the record.[2] In an extreme case the court m[illegible] properly report the facts to the reviewing authority for the pr[illegible]ferring of charges or other action.[3] The use of "menacin[illegible] words," in the sense of Art. 86, may expose the party to be pro[illegible]ceeded against as for a contempt. It may be added that me[illegible] discursiveness or irrelevancy in the statement will not justify th[illegible] court in restricting it unless it be thus so protracted as to del[illegible] unconscionably the proceedings.

As to the statement or argument on the part of the *prosecuti*[illegible] it is comparatively rare that this becomes subject to criticism [illegible] account of gross improprieties of language. Where, however, [illegible] exceeds a proper license, the same procedure is to be observed [illegible] in a case of a similar address on the part of the accused.[4]

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1. As remarked in Bombay R., 16, an indulgence in personalities [illegible] only weakens a defence but has the effect of disposing the pardo[illegible] power against lenity toward the accused.

2. Simmons § 588; McNaghten, 210; Macomb, 46; O'Brien, 2[illegible] De Hart, 161; DIGEST, 457. In G. O. 3, Army of the Potomac, 18[illegible] where the statement is reflected upon as of an improper character, it [illegible] added:—"The court would have been entirely justified in excluding [illegible] And see case in G. O. 23, Dept. of the Columbia, 1876. In a case [illegible] G. O. 157, Navy Dept., 1870, where the accused officer presented [illegible] statement "so disrespectful that the court would not receive it," [illegible] thereupon declined to offer any other, his action was censured by th[illegible] Secretary of the Navy.

It is for the *court*, of course, if the occasion justifies it, to rule out th[illegible] statement. The *judge advocate* has no authority to reject or suppre[illegible] it, however objectionable. G. O. 31, Div. of the Atlantic, 1873.

3. In some cases officers have been brought to trial for disrespect[illegible] language, &c., contained in their addresses, and in general convic[illegible] and sometimes dismissed. G. O. 2 of 1858; Do. 25 of 1859; McNa[illegible] ten, [illegible]. And see case of summary dismissal cited from James, *post*.

4. In a case in James, [illegible] in which the court, in connecti[illegible] with its judgment, reflects upon the address of the *prosecutor*, (wh[illegible] contained false and malicious charges against a superior officer,) the [illegible] reviewing authority concurring, proceeds to pronounce his dismissal fro[illegible] the service.

rocedure as to Reading, &c., of Statement. The state-
nt of the accused, if written, may be read by the accused him-
f, by his counsel, by a friend, or by the judge advocate. The
ter would not properly, and does not in practice, act herein
: the accused, where he proposes himself to present a closing
dress. In some important cases, in lieu of a written statement,
unsel have addressed to the court oral arguments, or arguments
t oral and part written, the oral portion being taken down by
tenographer.

he Statement as Evidence. While all due consideration
) be given to a statement properly presented, the statement
t evidence but a personal declaration or defence, and cannot
lly be acted upon as evidence either by the court or review-
uthority.[1] Nor can it be a vehicle of evidence, or properly
race documents or other writings, or even averments of ma-
l facts,[2] which, if duly introduced, would be evidence; and
ch are embraced in it, they are no more evidence than any
r part.

some instances the statement has been *sworn* to under the
ession that it will thus answer as a form of the exercise by
ccused of the privilege, (accorded by the Act of March 16,
) of testifying in his own behalf, and so become evidence.
. an impression is erroneous;[3] it is irregular and improper
rmit the statement to be sworn to, and that it is an affidavit
nothing to its legal effect.[4] The statement and the testify-
re distinct and independent proceedings, and the accused
and often does, make a statement although he may pre-
sly have taken the stand as a witness.[5]

hile the statement proper cannot be regarded as evidence, yet
e—as it is expressed in the Digest[6]—the accused "clearly

G. O. 21, Middle Dept., 1865; Do. 28, Dept. of W. Va., 1865;
31, Fifth Mil. Dist., 1869; Do. 23, Dept. of the South, 1870; Di-
457.

See Benét, 116.

DIGEST, 482.

G. C. M. O. 2, Dept. of the Mo., 1880; Do. 42, Dept. of Texas,
; Do. 6, 13, Id., 1882.

G. C. M. O. 2, Dept. of the Mo., 1880; Do. 19, Id., 1881; Di-
457.

Page 457.

and unequivocally admits therein *facts* material to the prosecu-
tion, such may properly be viewed by the court and reviewing
officer as practically *in the case.*" Such facts must of course not
be inconsistent with the plea. But admissions of this sort can
scarcely in any event constitute a sufficient basis for a prosecu-
tion unless supported by material testimony on the trial.

VI. CONTEMPTS.

Source of the Authority of Courts-Martial to Punish for Contempt. A general power to punish for contempt—
necessary as it is to protect the dignity of judicial tribunals and
ensure a proper administration of public justice[1]—is inherent in
all superior courts of record, independently of legislation.[2] But
it "does not arise from the mere exercise of judicial functions,"
and so is not commonly possessed by inferior courts unless the
same are courts of record, or are specially empowered to exercise
this authority by express statute.[4] Courts-martial, not being
courts of record,[5] nor indeed, strictly, courts at all in the sense
of being a part of the judicial department of the government,
but only instrumentalities in aid of the executive arm, of tempo-
rary and limited powers, without the capacity to issue process or
the means of enforcing their judgments,[6] have no general inherent
authority to punish for contempt, and are only authorized so to
punish as they are thereto expressly empowered by the 86th
Article of war.

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1. *Ex parte* Robinson, 19 Wallace, 510; *In re* Cooper, 32 Vt. 25[illegible]; State *v.* Goff, Wright, 79; *Ex parte* Smith, 28 Ind. 47; Samuel, 63[illegible]; O'Brien, 151–2; De Hart, 102.

2. 2 Hawkins, c. 1, s. 15; 4 Black. Com. 286; Samuel, 633; U. S. [illegible] Hudson, 7 Cranch, 34; Anderson *v.* Dunn, 6 Wheaton, 227; *Ex parte* Robinson, 19 Wallace, 505; *In re* Kerrigan, 33 N. J. 344, 347; *In re* Cooper, 32 Vt. 254.

3. *In re* Kerrigan, *ante.*

4. See *In re* Cooper, *ante*; Morrison *v.* McDonald, 21 Me. 556.

5. Chambers *v.* Jennings, 7 Mod. 125; *Ex parte* Watkins, 3 Peters, 200; Wilson *v.* John, 2 Binn. 215. The view expressed by Thring (Criminal Law of the Navy, 103,) that a court-martial is a court of record and invested with the same power to punish for contempt as any common law court, if applicable—which is questioned—to English naval courts martial, is certainly not law as applied to our courts-martial as governed by Art. 86.

6. See Chapter V.

t. 86—Its General Effect. This Article is as follows:—
ourt-martial may punish, at discretion, any person who uses menacing words, signs, or gestures, in its presence, or who rbs its proceedings, by any riot or disorder." Its proper nal may be said to be Art. 54 of the Code of James II, (itself ved from provisions of the Arts. of 1639, 1642 and 1666,) h made punishable the use of "braving or menacing words, s, or gestures," as also the 'drawing of a sword,' in the pres- of the court. Its effect in our law is to authorize the pun- ent only of "*direct*" contempts, or contempts committed in presence or immediate proximity of the court when in session, stinguished from "*constructive*" contempts, *i. e.* acts com- ed at a distance from the court, or beyond its "precinct," which operate to prevent and obstruct the due administra- of justice.[1] Thus, such acts as a refusal or neglect by a *ess* to appear[2] when duly summoned; or a publication in a spaper reflecting improperly upon the action of the court or fficers in a pending case, &c.,—acts which would be con- ctive contempts in the civil procedure,—would not be pun- ble by a court-martial under Art. 86.

urther, the Article contemplating *direct* contempts, its effect authorize the punishment of the acts which it enumerates y in such manner as direct contempts are properly punished,[3] *summarily.*

onstruction of the Article—"*A court-martial.*" This eral description includes *inferior* equally with the superior rts-martial. Some of the authorities indeed, repeating the v of Simmons,[4] have expressed the opinion that a regimental arrison court was not empowered to proceed for a contempt

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The two kinds of contempts at common law are sometimes also gnated as *criminal* and *constructive*. The direct and constructive empts which may be taken cognizance of by the U. S. courts are ified in Sec. 725, Rev. Sts. And see *Ex parte* Robinson, 19 Wal- 511.

That a failure so to appear by a military witness is not punishable contempt under Art. 86, but is a "neglect" cognizable under Art. as noticed by Maj. Gen. Thomas, in G. O. 58, Dept. of the Cum- nd, 1868.

Johnston *v.* Com., 1 Bibb, 598; Crow *v.* State, 24 Texas, 13; State uvinet, 24 La. An. 121. And see Samuel, 631–633; Simmons § Harcourt, 158; O'Brien, 311; De Hart, 103.

§ 435.

against an officer although it could do so against an enl man.[1] This opinion is founded upon the provision of the that such a court shall not *try* a commissioned officer. But the distinction is lost sight of between a trial and a proce for contempt, the latter not being a trial but a summary asse and enforcement of executive authority. Thus an officer wh his conduct before an inferior court, as a witness or otherwi guilty of a contempt, may be as legally subjected to the pu ment provided by the Article as may a soldier, and as proper he may be before a general court.

The term under consideration, "a court-martial," canno held to include a *court of inquiry*.[2] There is not indeed the reason for investing a court of inquiry with authority to pu for contempt as exists in the case of a court-martial, the fo not administering justice or being in fact a court, but o board or commission of investigation. Moreover the Artic conferring a summary and in a measure arbitrary power, is strictly construed, and, as it does not give this power to c of inquiry in express terms, cannot properly be held to co the same by implication.[3]

It may be observed in this connection that, in order to emp a *court-martial* to proceed as for a contempt, under Art. 86 not essential that it should be *sworn* for the trial for which i assembled. It cannot indeed proceed to *trial* without the tional qualification of an oath, but, as already remarked, the ceeding for a contempt is not a trial. Thus, before the oa taken by which the organization for the trial is completed court is as fully empowered to pass upon and punish a cont as it is subsequently. Such was in fact the ruling of the J Advocate of the Army in an early case in 1844,[4] and such the action taken by the court in a more recent case, promulg

1. Griffiths, 30; Harcourt, 157; De Hart, 105; Benét, 31.

2. A contrary view expressed by De Hart, (p. 279,) is repeat Benét, (p. 182.) It may be noted that the power in question is als given to courts of inquiry by the Articles specifically relating t same—Arts. 115-121.

3. "The power to punish for an alleged contempt is in its natu bitrary, and its exercise is not to be upheld except under the ci stances and in the manner prescribed by law." Batchelder *v.* M 42 Cal. 414.

4. Private Shalon's case, referred to in note *post*, under "*Punish*

eneral Orders,[1] in which the proceedings were approved by President.

May punish at discretion." These words, it is to be arked, are not mandatory, the court being *authorized* not *ired* to punish. Thus it is always open to the court to *waive* right of proceeding under the Article, and, instead, to prefer ges against the offender, through its president or judge advo-, or to report the facts to the proper commander for his on.[2] In the majority of the cases in our service this course in fact been pursued.[3] Except, however, where the offence mitted is of a peculiarly grave character, demanding a severe ishment and one not appropriate to the action under consid-ion, it will be the preferable course,[4] and indeed in general duty of the court,[5] to proceed summarily under the Article.

unishment. As to the punishment authorized, the "dis-ion" of the court, in the absence of any statutory provision,

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G. C. M. O. 36 of 1870.

Simmons, (§ 434,) referring to this alternative mode of proceeding, :—"At other times charges have been preferred by the court, or irection of the confirming or other superior authority, whose notice been drawn to the offence either by a special report or by the circum-es appearing in the record of the proceedings." And see Samuel, Griffiths, 30; Harcourt, 158; O'Brien, 152; G. O. 3 of 1853.

ere is a similar *civil* procedure. Thus the court say in William-s Case, 26 Pa. St. 19:—"It (contempt) is punished sometimes by tment, and sometimes in a summary proceeding." And to a simi-ffect see U. S. *v.* Jacobi, 1 Flippin, 108, and *In re* Mullee, 7 Blatchford, where it is held that a contempt offered to a U. S. court is a crime ist the United States.

See instances in G. O. 14 of 1855; Do. 1 of 1858; G. C. M. O. 37 73; G. O. 63, Dept. of the Tenn., 1863; Do. 126, Sixteenth Army s, 1863; G. C. M. O. 9, Fourth Mil. Dist., 1867; G. O. 58, Dept. e Cumberland, 1868; Do. 17, Dept. of the Columbia, 1871; Do. 79, t. of the South, 1874; Do. 39, Div. of the Atlantic, 1876; G. C. M. O. pt. of the Platte, 1874. And compare cases reported by Hough, 97; (P.) 675. The charge should be laid under Art. 62, or, in an aggra-d case of an officer, under Art. 61. The trial should, obviously, be before a new court, *i. e.* a court composed of officers other than e who were members of the court before which the contempt was mitted. See Hough, (P.) 676; Harcourt, 158.

Samuel, 638; Harcourt, 158; O'Brien, 152; De Hart, 106.

See *In re* Cooper, 32 Vt. 257, where it is said of the power to sh for contempt:—"Its exercise is not merely personal to the court ts dignity: it is due to the authority of law and the administration tice."

or defined custom of the service, on the subject, will properly guided in the first instance by a reference to the common and the civil statutes and practice. From these sources it ascertained that the appropriate and customary punishment contempt is fine or imprisonment, or fine *with* imprisonme Such was the usual punishment at common law,[1] and such—i fine *or* imprisonment—is the only penalty authorized by the vised Statutes to be imposed by the courts of the United Sta In the civil practice generally the punishment for direct c tempts is commonly either a small fine which can be satisfied the moment or presently, or a brief commitment intended for temporary restraint of the person;[3] it being evidently deemed be of the essence of such punishment that it should be sim light and provisional, in the same manner as the summary

1. Anciently, upon the theory that the King was present in courts of justice, and a contempt was a personal affront to his maje some contempts were punishable with death. 4 Black. Com. 124. the Articles of War of the Earls of Northumberland and Essex, in reign of Chas. I, contempts before military courts were made simi punishable. Samuel, 630; 1 Clode, (M. F.) 444.

2. Rev. Sts., Sec. 125. And see *Ex parte* Robinson, 19 Wal 512. The statute is merely declaratory of the common law princi Anderson *v.* Dunn, 6 Wheaton, 227.

3. A review of the leading cases shows that the fine adjudged (f first offence) has generally been not less than five nor more than hundred dollars. In some cases the judgment has been that the p stand committed to jail till the fine is paid. When imprisonment been imposed, it has very rarely exceeded thirty days and someti has been limited to a few hours. In Hill *v.* Crandall, 52 Ills. 70, offender, an attorney, for contemptuous and defiant language addre to the court, was required to pay a fine of five dollars and be impriso in the county jail until it was paid. In People *v.* Boughton, 1 monds, 143-6, where the Attorney General of the State and a couns the case engaged in an altercation and exchanged blows, the court c mitted them both to the common jail for twenty-four hours. The s term, with a fine of $100 and costs, was imposed, for an assault c mitted by an attorney on the judge, in State *v.* Garland, 25 La. An. In the case of *In re* Kerrigan, 33 N. J. 344, the punishment, for insu language addressed to the court by a party present, was imprison in the county jail for fifteen days. In Middlebrook *v.* State, 43 C the punishment adjudged, for a violent assault committed in court room by the plaintiff in a suit upon the counsel for the defend was thirty days in the common jail, with $100 fine and costs. The imprisonment should not be for an indefinite period but for a time pra cally certain. King *v.* James, 5 B. & Ald. 894; Yates *v.* People, 6 Joh 349; Yates *v.* Lansing, 9 Johns. 419. In the larger number of cases penalty has been *fine* only.

ing of which it is the result is secondary and incidental in aracter.

, in *military* cases, the appropriate punishment under the le would in general be either a fine, in the form of a forfeiture ıy moderate in amount and proportioned to the rank and hly pay of the offender, or a confinement for a certain num- of hours or days either in the guard-house or in quarters.[1] court, however, would not be precluded from substituting, ding, some other military punishment, not inappropriate to ccasion nor excessive in quality or quantity.[2] The extent character of the penalty will depend mainly upon the par- ır *circumstances* which exhibit the offence as aggravated or verse,[3] and upon the *intent* of the party.[4] In imposing the hment some regard may well be had to the relation which ffender bears to the trial or investigation. Thus if he be cused, his punishment should, if practicable, not be such

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ı adjudging confinement, the distinction indicated in the Army ıtions between the kinds of restraint appropriate for officers and s, respectively, may ordinarily well be observed. See Samuel, Where, however, an officer is already in close arrest, *i. e.* con- o his quarters, the court is not precluded from imposing, for a ıpt, a stricter restraint. Thus in a case of this kind in G. C. M. of 1870, the punishment adjudged was—"To be confined in charge officer of the guard in the post guard-house, during the pending r during the pleasure of the court, and denied all communication ny one except his counsel."

n a case of a soldier published in G. C. M. O. 1, Dept. of Texas, there was added to a confinement the penalty of walking for a period with a loaded knapsack, weighing 25 pounds.

the penalties of fine and imprisonment, Samuel, (p. 634,) sub- for cases of officers—"reprimand." If the court resort to this ment, it may adjudge the reprimand to be administered at once president of the court, or by the reviewing authority in passing he whole case.

The offence will be aggravated where it is *repeated*, (see, for ex- , The King *v.* Davison, 4 B. & Ald. 333, where the prisoner who cted his own defence, was, for repeated improper language used in gument, fined successively £20, £40, and again £40;) or where *second* offence though of a different nature, (see State *v.* Garland, . An. 532;) or where it is committed after a warning or admoni- om the court, (as in both these cases;) or where it is justified by rty on the hearing, (as in State *v.* Garland.) See *post*—"Purging ontempt."

See Sturoc's case, 48 N. H. 432. As to the effect of disavowals of per intent, and of expressions of regret, in excusing or purging ntempt, see *post*.

as to interfere either with the regular course of the trial o
the presentation of his defence to the same.[1]

It is quite clear that the imposition of dismissal, suspe
dishonorable discharge, prolonged forfeiture, or protrac
very severe imprisonment—penalties which have been re
to in some cases[2]—would be quite foreign to the purpo
province of a proceeding for contempt, and should prop
regarded as beyond the scope of the authority of a court-
under the 86th Article. Punishments of this kind might
be appropriate where the party, instead of being proceeded a
as for a contempt, was brought to trial upon a charge laid
Art. 61 or 62, for some grave military offence involved
conduct.

Execution of the punishment. The punishment, i
or forfeiture of pay, may be executed through the orders
reviewing officer, in passing upon the proceedings, in th
manner as a sentence.[3] If the punishment consists in im

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1. See The King v. Davison, 4 B. & Ald. 340.

2. The following were instances of summary punishment for co
excessive in kind or degree: Case of Lt. Col. Backenstos, adjudg
be cashiered," published in G. O. 14 of 1850; A case, cited by
C. M., 455, of a surgeon, punished by "suspension from ra
and allowances for six months;" A case of a soldier mentioned b
mons, § 435, note, and also Hough, (P., 676,) condemned to
portation for life;" Case of Private Shalon, 7th U. S. Infy.,
adjudged "to be confined for six months in a dark prison—ever
month on bread and water, and chained to the floor—and to for
pay for the same period;" A case published in G. C. M. O. 37,
Mil. Dist., 1868, of a civilian witness at a trial before a military co
sion, adjudged "to be confined at hard labor for one year, and to
fine of five hundred dollars, and to be further confined until such
paid." In the first and third of these cases the punishment was fo
disapproved by the reviewing authority. In Shalon's case it was
partly mitigated. In the last case, the party having been in confi
for two months, the punishment was remitted by the District
commander who remarked that confinement *at hard labor*, for conte
court, was "unusual and improper." It is believed, however, th
penalty would not necessarily be improper if restricted to a brie
In a case in G. O. 70, Dept. of the South, 1874, where a soldie
contempt not aggravated, was adjudged to be confined at hard la
six months, with a forfeiture of $5 per month,) the punishme
disapproved by Gen. McDowell to be "excessive" and was mitig
confinement at hard labor for one month."

3. That an accused may have been *acquitted* of a charge for w
was on trial cannot affect the authority to execute a punishment a

or other bodily restraint, it may be executed through the of the convening authority, upon a reference and report of ıcts to him by the court, if he is near at hand or readily ac- ›le; if not, the court, which is incapable of executing its nandate,[1] may apply in the first instance to the post or other :diate commander who will execute the judgment with the propriety and legality as he executes the arrest of the ac- . under the charges, furnishes the court with a guard, or rms any other ministerial function in aid of its proceedings.[2] ıstruing the provisions of the Article under consideration in :ction with those of Arts. 104 and 109, it may perhaps be ioned whether reviewing officers are authorized to *disapprove* hments imposed for contempts by general courts-martial. :ding that they have the power, as in the case of sentences, lear, in view of the discretion as to punishment expressly l in the court by the Article, that such power should rarely ercised.

ny person." This designation includes certainly any *ry* person who may be before the court, whether in an offi- ıpacity or otherwise. It thus embraces the judge advocate[3] : accused, a military witness, prosecutor, counsel, clerk, or , or any officer or soldier who may be present as a spectator. ank of the person is immaterial.[4] Though the party charge-

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›ending the trial, for a contempt committed. See Hough, (Prac- 250, note 41.

t would appear that *English* courts-martial have sometimes placed s in arrest for contempt. See Samuel, 635; Hough, 455. Whether such an authority would now be conceded to them, it is clear that ıuch can be exercised by courts-martial in this country. See Chap- :.

Were courts-martial attended by provost-marshals, these officials be sufficient for the execution of some minor punishments under 6.

The case of the judge advocate, however, is so assimilated to that ıember, (see text *post*,) that although the court would be fully em- :ed to punish him summarily for a contempt, it would probably, in : of any aggravation, prefer to adjourn, and, reporting the facts to ›nvening authority, (with formal charges, if thought proper,) ap- : the same time for the detail of a new judge advocate.

See O'Brien, 152–3; also McNaghten, 165–168, where is aptly the case of the commitment, for an aggravated contempt, of the : of Wales, afterwards Henry V, by Sir Wm. Gascoigne as Chief e of the King's Bench.

able with the contempt may be senior in rank to all the membe of the court, he is yet equally subject to be proceeded agai under the Article as if he were the youngest officer in date in t service. To this effect was the ruling in the leading case Major John Browne of the British army, in 1786, as reported Samuel and other subsequent writers.[1]

Inclusion of civilians. Whether the term "any person includes also *civilians* is a question upon which the authoriti have differed.[2] In the opinion of the author, a court-marti while empowered of course to cause a disorderly civilian to ejected from the court-room, is also empowered, under the co prehensive terms of Art. 86, to punish, for a direct contempt, fine or imprisonment, any such civil person, whether witne clerk, reporter, counsel, or a mere spectator at the trial, with same legality as it may an officer or soldier of the army. T enforcing of the Article in the instance of a civil person is not exercise of military *jurisdiction* over him. He is not subject to trial and punishment for a military offence, but to the le penalties of a defiance of the authority of the United St offered to its legally-constituted representative. Any less po in the court than one of summary punishment would be i perfect and insufficient under the circumstances. "The m power," says Aldis J., in a case in Vermont,[3] to remove dis derly persons from the court-room would be wholly inadequ to secure either the proper transaction and dispatch of busin or the respect and obedience due to the court and necess for the administration of justice." In view, however, of t embarrassments likely to attend the execution through milit machinery of a punishment adjudged a civilian for a contem under the Article, it would in general be advised that a cou martial, in a case of such contempt, should confine itself to ca ing the party to be removed as a disorderly person, and, in

1 See especially Samuel, 636.

2 Samuel, (p. 638–9; and see Harcourt, 158; Clode, 138,) held negative; McNaghten, (p. 168–9,) and Hough, (p. 440,) the affirm tive. De Hart, (p. 106–8,) while treating the question as one involv in doubt, seems to be of opinion that a court-martial may not punish civilian for a contempt under the Article. Benét, (p. 32,) expresses contrary view.

3 *In re* Cooper, 32 Vt. 258.

ıvated instance, where practicable, procuring a complaint to dged against him for a breach of the public peace. Where, :ver, the civilian is a person employed by the military authori- n connection with the army as a post-trader, quartermaster's oyee, &c., the preferable course will generally be to punish by a confinement in the post guard-house, for a brief period l he shall purge his contempt.

embers of the court not included. Though it is not a ısary implication from the terms of the Article, it is yet a :al inference from its context, that it could not have been ded in the designation "*any person*," comprehensive though to include a member of the court itself. And so it has been in this country; a direct ruling on the point by the Secre- ıf War having been made in 1850, in the case of Lt. Col. :nstos. This officer, as senior member and president of a ıl court-martial, was summarily proceeded against by the as for a contempt, (consisting in certain arbitrary and dis- y conduct,) and was sentenced "to be expelled from the and to be cashiered." Upon this action the following de- was announced in General Orders:[1]—"The proceedings of ›urt having been submitted to the President of the United are not approved, as the 76th" (the present 86th) "Article does not confer on a court-martial the power to punish its ıembers." In a case of this character, therefore, the proper , in view of this rule, would in general be for the court to n and at once report the facts to the convening authority, ı formal charge preferred, if thought proper,) with a view ring the offending member brought to trial for conduct ıicial to good order and military discipline.[2]

'ho uses any menacing words, signs, or gestures, ı presence." This phraseology is unsatisfactory; the em- ıent of the single descriptive term "menacing" having the of excluding from the cognizance of the court, under the e, the use, in its presence, of improper words, &c., which › not express or involve a threat or defiance.[3] Thus lan-

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:. O. 14 of 1850.

ee Army Regulations, par. 884, based on the case of Backenstos.

As to *menacing* words, they imply a threat." Hough, (C. M.) The manner, tone, emphasis, &c., of the speaker, with the sur-

guage, however disrespectful, if it be not of a minacious character, cannot, unless actually amounting to or creating a *disorder*, in the sense of the further provision of the Article,[1] be made the occasion of summary proceedings and punishment as for a contempt—a defect certainly in the statute.

Menacing or threatening words or acts aimed at the *court* or its individual *members* are no doubt especially contemplated by the Article;[2] and words of this nature may either be spoken, or presented in a writing, as, for instance, in the closing address or argument.[3] Menaces, however, if directed at the accused or a witness, or at the judge advocate, or any other person in a public official position before the court or under its legal protection, would also, it is conceived, properly fall within the designation of the Article, such conduct being equally a contempt of the court itself.[4] As to the case of a witness, while the ordinary bullying practised sometimes toward persons on the stand would scarcely come under the description of 'menacing words, gestures,' &c., an attempt to intimidate a witness, by alarming him with the prospect of some specific danger in case he should make or not make a certain disclosure or statement, might readily be deemed to fall within the category.

The term "*in its presence*" is taken to mean before the court, in the court-room, or in its sight or hearing, and also while it is in session. Menacing language, &c., however, used toward the

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rounding circumstances, are to be taken into consideration in determining whether his language imports a menace. See *Ex parte* Robinson, 19 Wallace, 511; *In re* Cooper, 32 Vt. 256; Hough, 455.

1. Such were the character and circumstances of the language employed in the case of contempt published in G. O. 17, Dept. of the Columbia, 1871, where the accused, when asked by the judge advocate he had any statement to make to the court, replied—"I'll be damned if I have any statement to make," and left the court-room abruptly and without proper authority. And see cases in G. C. M. O. Dept. of Texas, 1875; G. O. 79, Dept. of the South, 1874; G. O. 1 Sixteenth Army Corps, 1863—where disrespectful and insolent language was, apparently as constituting a *disorder*, treated as a contempt.

2. See the instance given in James, 504, and Hough, 454, of an officer who, as prosecutor, repeatedly menaced the court "with the vengeance of a superior tribunal, accompanying his expressions by the most defiant attitudes."

3. See case cited in Hough, 455; also The King *v.* Davison, cited note *ante*.

4. See 4 Black. Com. 126; Hough, 443.

r a member, during a recess,—the day's session of the ot having been adjourned,—might well be regarded as the terms of the Article.[1]

who disturbs its proceedings by any riot or dis- ' The word "riot" is regarded as here employed not in tly legal sense, but rather in the sense in which it is com- used, as meaning—to cite the definition of Webster— n or unrestrained behaviour; uproar; tumult." The term ler" is still more general, and, in a broad sense, (analo- that in which it is employed in Art. 62,) would mean, ', any conduct in breach of the *order* of the proceedings. the connection in which it here occurs, it is construed as g more than a mere irregularity and as importing disorder and pronounced as to amount to a positive intrusion upon erruption of the proceedings of the court. The more examples of such a disorder and disturbance as are held ntemplated by the Article are—assaults committed upon s,[2] or upon persons connected with the court or properly ;[3] altercations between counsel[4] or spectators;[5] drunken[6]

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npare State *v.* Garland, 25 La. An. 532, where an assault com- pon the judge, during a recess of the court, but while it re- nadjourned, was held a direct contempt, and punished as stated *nte.*

cases reported in Hough, 97; Id., (P.) 675; also in note *ante,* Punishment."

ikewise all such as are guilty of any injurious treatment to those immediately under the protection of a court of justice, are pun- by fine and imprisonment." 4 Black. Com. 126. And see 442. The leading instance in our service is that published in 3, Dept. of the Tenn., 1863, where a witness assaulted and y shooting with a pistol, in the court-room, the accused, for g to impeach his testimony. He was not proceeded against t. 86 but tried for murder.

case of People *v.* Boughton, cited in note under "Punish- *nte.* But hasty expressions of counsel, under excitement, will y be overlooked where no contempt is intended. St. Croix *v.* right, 532.

U. S. *v.* Emerson, 4 Cranch C., 188; State *v.* Woodfin, 5 Ire. e latter case was one of a breach of the peace *in facie curiæ,* g in a fight between two individuals just outside of the court-

G. C. M. O. 59, Dept. of the Platte, 1872, a case is referred to ier ordered by the court to be confined for contempt in using anguage, in his testimony as a witness, while apparently intox-

or indecent[1] conduct; loud and continued conversation noise or confusion which prevents the court from hearing testimony, &c.;[2] any shouting, cheering, or other express applause or disapprobation, especially if repeated after checked;[3] contumelious or otherwise disrespectful langua dressed to the court or a member or the judge advocate

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[illegible] In general, however, contempts by way of drunken conduct the part not only of members but also of parties or witnesses, have made the occasion of formal charges, under Art. 62, (formerly Art. [illegible] and regular trials before new courts. See cases of this kind in G. O. [illegible] of 1855; Do. 1 of 1858; G. C. M. O. 52, Dept. of Va., 1865; Do. [illegible] Fourth Mil. Dist., 1867; Do. 7, Dept. of the Platte, 1874; G. O. [illegible] Div. of the Atlantic, 1876. In G. C. M. O. 39, Hdqrs. of Army, 18[illegible] is a case of an officer charged and convicted under both Art. 61 and A[illegible] [illegible] for appearing in uniform drunk before the court by which he [illegible] being tried. In the case in G. O. 1 of 1858, the offender, a memb[illegible] became disorderly *upon being challenged.*

1. In G. C. M. O. 1, Dept. of Texas, 1875, it was properly held [illegible] to constitute a contempt under Art. 86 for a soldier to come before [illegible] court by which he was to be tried with his clothing in disorder.

2. In the case of Acton tried for murder, 17 Howell's State Tri[illegible] [illegible] the judge said—"Crier, make proclamation to keep sile[illegible] under pain of imprisonment. This is a trial for life and death, and [illegible] shall commit any one that don't hold their peace."

3. See Whittem v. State, 36 Ind. 212; State v. Goff, Wright, [illegible] State v. Coulter, Id. 421; Hough, 444. "It is sufficient that the [illegible] or hindrance be such, however small, so that the court cannot distinc[illegible] hear what is addressed to it, by its members, &c., or those before [illegible] court as witnesses." Id. 452.

4. In the report of the case of Colledge, in 8 How. S. T., 714, (16[illegible] after the statement of the verdict of guilty, the following occurs:—"[illegible] which there was a great shout given, at which the Court being offend[illegible] one person who was observed by the Crier to be particularly concer[illegible] in the shout was committed to gaol for that night, but the next m[illegible] [illegible] having received a public reproof, was discharged." In the re[illegible] of the trial of the Dean of St. Asaph, 21 How. S. T., 865, (1783,) du[illegible] the recital of some remarks of Erskine as counsel for the defence, [illegible] note is made: "Here some of the audience clapped, and the Co[illegible] [illegible] a gentleman £20." In Stone's case, 6 Term, 530, (also repo[illegible] [illegible] How. S. T., 1438,) it is narrated that:—"On this, (the rende[illegible] of the verdict of not guilty,) there was considerable shout in the [illegible] and a man of the name of Thompson, jumping up in the middle of [illegible] court waving his hat and halloing, was taken into custody and [illegible] [illegible] But see the note to the case of the Earl of Shaftesbury, 8 Te[illegible] [illegible] where, when the grand jury "returned the bill '*Ignora*[illegible] the people fell a hollowing and shouting," but no one was punished [illegible] contempt.

:mperate a character as to derange the proceedings, especially ersisted in after a warning from the court.[1]

ut acts not of a violent or disturbing character, though they ;ht constitute contempts before the civil courts, would not be *rders* in the sense of the present Article. Thus a quiet re-ıl by a witness to be sworn, or to answer a proper question on examination, or a standing mute or simple refusal to testify ıll,[2] would not be punishable as disorders and contempts before ourt-martial.

It is not essential that a disturbance of the court or interruption its business should have been *purposed* by the party; that he claims any such purpose will not affect the offence.[3] "The stion whether a contempt has or has not been committed does depend on the intention of the party but upon the act he has e. It is a conclusion of law from the act."[4] Where, how-r, the court is satisfied that the contempt was quite uninten-ıal, it will certainly impose a less penalty,[5] or it may, in its retion, refrain from proceeding to punish at all.[6]

he words "in its presence" not being connected in the con-with the clause of the Article under consideration, the same

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See case in G. C. M. O. 1, Dept. of Texas, 1875; also Hill *v.* ıdall, cited in note *ante*, under "*Punishment.*"

DIGEST, 69. This ruling, made by Judge Advocate General Dunn pril, 1880, was to the effect that a court-martial, having no general non-law power to punish for contempt, (see Chapter V,) and not ; thereto authorized by the terms of Art. 86, was not empowered to sh, as for a contempt or otherwise, a witness duly summoned before o refused to testify. This conclusion has recently been affirmed ı opinion of Acting Judge Advocate General Lieber, of Aug. 27, as also by an opinion of the Attorney General of Oct. 23, 1885—given in the case of a civilian witness, who, on being duly sum-ed and appearing before a court-martial in the Department of Texas, l mute. The Atty. Gen. in holding that the power could not be ised under the existing law, notices that it was once conferred upon s-martial of the army by Art. 6 of Sec. XIV of the Code of 1776, so upon *militia* courts by the Act of April 18, 1814, c. 82, s. 4. view thus expressed was approved by the Secretary of War in a munication to the Comdg. Gen., Dept. of Texas, Oct. 27, 1885, ng it as his decision that "courts-martial are powerless to punish ians for failure to testify."

Watson *v.* Savings Bk., 5 So. Ca. 159. And see State *v.* Garland, La. An. 533.

Wartman *v.* Wartman, Taney, 370.

See Sturoc's Case, 48 N. H. 432.

See *post*, under "*Purging the contempt.*"

may be held to include disorders which, though dist
proceedings, are not committed in the court-room itse
Sec. 725, Rev. Sts., which authorizes the infliction by t
of summary punishment for contempts when committ
presence of the court or so near thereto as to obstruct
istration of justice," it has been held that disorderly
or near the entrance of the court-room, or outside but i
or hearing of the court, and so loud or conspicuous a
rupt and embarrass the proceedings, was a contem
similar rule might properly be applied to like distu
military trials.[2]

Form of Procedure under the Article. As to t
and form of the exercise by the court of the summary
ferred by the Article, it is first to be remarked tha
warning, call to order, or command to silence, by the
as the organ of the court, at the first symptom of any
manifestation, may often have the effect of preventing
rence of an act of the class which the Article is d
correct.[3]

As to the procedure when the court finds itself call
avail itself of the discretion to punish—it is clear, as h
been indicated, that no form of trial or investigation is
The act having transpired in the presence, (or in th
hearing,) of the court, no evidence is in general neces
form it of the circumstances, nor is any introduced in
Opportunity is properly given the offender to present
he may have to offer in excuse or explanation of his la
behaviour,[4] but beyond this no formality whatever is

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[2] U. S. v. Emerson, 4 Cranch C. 188; U. S. v. Carter.
And see, to a similar effect, in the State courts, State v. Woo
State v. Goff, Wright, 78; State v. Coulter, Id. 421.

[3] "Any noise close to, or so near the court as to disturb
proceeding is a contempt of court. * * * Sentries should be
required to prevent such a disturbance." Hough, 444.
Black Com. 125; Whittem v. State, 36 Ind. 212.

[4] See Hough, 444; Acton's case, cited in note *ante;* St
Wright, 78.

[5] The punishment "may be adjudged without the previ
proof, the offence being committed under the eye of the cou
capable of being more clearly or satisfactorily proved." Sa

[6] "The court proceeds to punish after such hearing as may
just and necessary." A. & K. R. R. Co. v. A. R. R. Co.
And see Fanshawe v. Tracy, 4 Bissell, 497; Wartma
Paley, 370; Samuel, 634-5; Simmons § 434; O'Brie

proceeding not being a trial, it is wholly unnecessary to the court for the purpose, and it is also quite unnecessary, gh this has sometimes been done,) to have a charge and ication preferred or prepared.[1] As there is no formal accu-, so there is no arraignment, plea, prosecution, or defence. tly observed by the court in a case already cited,[2]—"Where ontempt is committed in the presence of the court, and the acts upon view, * * * and inflicts the punishment, will be no charge, no plea, no issue, no trial." It need y be added that no challenge to the members is appropriate owable.

therefore that is required is, that the court should tempo- discontinue the investigation or other business upon which engaged, and proceed at once or as soon as may be conven- to pass upon the matter of the contempt, as an interlocutory tion. The question is in general initiated by the motion of mber or the judge advocate, and the court sometimes clears nsider whether it will take action. The proceeding will ist mainly in the court announcing to the party, through its dent, that he is held to have committed a contempt within escription of the Article, and that it is proposed to punish for the same unless explained away, and calling upon him ake any explanation or statement he may have to offer. action will preferably be taken in open court, as in civil Proper opportunity for a hearing being afforded, and the 's statement, if any, being made, deliberation is then had, punishment—a contempt being found—is adjudged. The usion is then publicly announced to the offending party. If ed to be immediately or presently enforced, the punishment clared is without delay reported to the convening authority, he commander of the post or station if competent to execute

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103; Benét, 31. In a case published in G. C. M. O. 37, Fourth ist., 1868, where the court denied the application of the party to statement of his defence to the charge of contempt put on record, viewing authority, (Gen. Gillem,) observes:—"He should not ave been permitted to make his statement, if pertinent to the n, but should have been allowed a full opportunity to be heard , or by counsel, to show cause, if he could, why he should not be ed for contempt."

he view, as expressed by O'Brien, (p. 152,) that "the court must rn and a distinct charge made out," and repeated be Benét, (p. clearly founded upon a misapprehension of the legal character of ceeding.

'hittem *v.* State, 36 Ind. 211.

it. A full record of the proceeding is at once made by the advocate,[1] not separate from but in and as a part of the record of the trial, showing the occasion and circumstan the contempt, the words or acts which constituted it, the or statement, if any, of the party, the action taken by the its judgment, the disposition of the offender, &c.

Purging the Contempt—Remission of the Punishm At the hearing, or before the court-martial has proceede judgment upon the contempt, it may, in its discretion, rec an apology for his conduct from the offender, and, if the sam deemed sufficient and satisfactory, may consider him to h "purged" himself of the contempt, and so discontinue the spec proceeding.[2] But, as is observed by the court in a late case,[3] " expression of regret for the contempt committed is always h to be essential to purge the contempt;" a mere "disavowal of improper motive" not being sufficient. Much less, where disavowal is accompanied by a justification by the party of conduct; for this, as held in another case,[4] is an *aggravation* the contempt.

Where, however, the offence is one of a grave character, expression of regret, or disclaimer of ill intent, on the part of offender, though, when offered in good faith, it may, as has b seen, go to reduce the punishment, will not in general be cepted as purging the contempt, or properly relieving the p from the penalty which public policy requires should be forced.[5]

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1. That an immediate record should be made, see 2 Hawkins, c. s. 1; State *v.* Matthews, 37 N. H. 453.

2. See Simmons § 434. In Capt. Burke's case, (Samuel, 635,) officer "apologized for his conduct," and, "after a slight admoni and reprimand, was discharged of the contempt." In State *v.* Coul Wright, 427, the court, in accepting the apology of the defenda (officers of a militia company, marched and exercised with loud ma music in the immediate neighborhood of the court-house,) as pur the contempt, say:—"They disclaim on oath any intention of i rupting the business of the court, or design to contemn its autho They assert the most perfect respect for the court and their wa knowledge that it was holding its session as they approached and pa the court-house. Singular as this state of fact appears, the charact these gentlemen forbids all suspicion that they have not uttered truth." And see G. O. 79, Dept. of the South, 1874.

3. Watson *v.* Savings Bk., 5 So. Ca. 159.

4. State *v.* Garland, 25 La. An. 532.

5. In Sturoc's case, 48 N. H. 428, Perley C. J. says:—"The de

after a court-martial has passed finally upon a matter of mpt, and imposed a specific punishment therefor, it is not, e opinion of the author, empowered to remit, in whole or in the penalty awarded.[1] The contempt, like any other mili- offence, is a crime against the United States;[2] a fine imposed ray of punishment accrues to the United States;[3] and, as to mprisonment or other punishment, the same, when once duly idged according to Art. 86, is, as to the matter of its execution, ally with a sentence imposed by the authority of any other icle, beyond the control of the court. The power of remission, refore, can be exercised only by the military commander au- rized thereto by Art. 112,[4] or by the President.[5]

;" (the publisher of a newspaper which had commented improperly on the case,) "cannot discharge himself by alleging that he meant no m and did not suppose he was doing anything illegal." In People Boughton, (where the contempt consisted in a personal altercation l exchange of blows between the counsel in open court,) the judge, withstanding the regrets expressed by both the offending parties, de- ed to abate the punishment—twenty-four hours in jail—and adjourned court in order that it might be fully executed.

In a case, already cited, published in G. C. M. O. 36 of 1870, the rt, after imposing the punishment of confinement, accepted an apology the offender and remitted the punishment. Here indeed the con- nent adjudged was "during the pleasure of the court." But this of punishment, besides being objectionable as indefinite, is re- led as unauthorized since the term of a confinement adjudged for a ary offence cannot be made to depend upon the will of the court.

U. S. *v.* Jacobi, Flippin, 108; *In re* Mullee, cited in note *post.*

Fanshawe *v.* Tracy, 4 Bissell, 498. And see Matter of Rhodes, o. Ca. 518; Morris *v.* Whitehead, Id. 637; also Opins. of At. Gen. in second succeeding note.

Art. 112 authorizes, in general terms, officers ordering courts- ial to "pardon or mitigate any punishment adjudged" by them, ain special penalties only being excepted, which are reserved for ction of the President.)

It is held in *In re* Mullee, 7 Blatchford, 24, that, a contempt of a court, being an offence against the United States, the *court* cannot e or discharge the offender from the punishment imposed, but the lent, as the pardoning power, can alone do so. And see III Opins. en. 622; IV Id. 458, where it is held that the pardoning power President extends to the remission of fines imposed for contempts S. Courts. And see State *v.* Sauvinet, 24 La. An. 119, as to the authority of a State executive to pardon in cases of contempts State courts.

court, however, may *recommend* the remission of the punishment proper authority. As was done in a case in G. C. M. O. 52, Dept. 1865, where a witness, who had been punished with confinement ikenness in court, appeared the next day and apologized.

CHAPTER XVIII.

EVIDENCE.

Courts-martial, which are bound in general to obser fundamental rules of law and principles of justice observe expounded by the civil judicature,[1] are also in general to b erned, upon trials, by the *rules of evidence* of the common recognized and followed by the criminal courts of the co Thus, indeed, it is laid down and repeated by the authorit the subject; and inasmuch as the rules of evidence are i main the result of the best wisdom and experience of the approved and ratified by modern intelligence, it is clear tha

1. Tytler, 352; Kennedy, xiii; Prendergast, 208; Maltby, 1 comb, 80.

2. "Courts-martial, having cognizance only of criminal offenc bound, in general, by the rules of evidence administered in crimina in the courts of common law; the only exceptions being those are of necessity created by the nature of the service, and by the tution of the court, and its course of proceeding." 3 Greenl. Ev. 476. "As no rules of evidence are specially prescribed by Congr the observance of courts-martial, it must be deemed that such are contemplated to be governed, in general, by the same rules dence which govern the ordinary courts of criminal jurispru These rules are supplied by the common law, excepting of course otherwise provided by statute, in which case the latter prevail." O of At. Gen. Brewster, in Whittaker's Case, March 17, 1882. A a similar effect, see Grant *v.* Gould, 2 H. Black. 69, 87; Lebar Heath, 47 N. H. 359; People *v.* Van Allen, 55 N. Y. 39; II Opin Gen., 344; 1 McArthur, 47; Warren, 8, 15; Harcourt, 76; Sim § 811, 1006; Pipon & Col., 138; Hickman, 35; Kennedy, xiii 120; Griffiths, 65; Prendergast, 206; Maltby, 2; O'Brien, 10 Hart, 334, 405; Benét, 224; G. O. 51, Middle Dept., 1865; Do. 36 Mil. Dist., 1868; G. C. M. O. 60, Dept. of Texas, 1879; Do. Dept. of the East, 1880; DIGEST, 253.

That the rules of evidence are substantially the same in the c as in the civil procedure, see 1 Greenl. Ev. § 65; Wills, 73; U Winchester, 2 McLean, 135; Brown *v.* Schock, 77 Pa. St. 471; 4 of 1843.

ribunals cannot in general safely assume to reject or ignore . But the essence of all military proceedings is summary igorous action, and, moreover, courts-martial are no part of udiciary of the United States, are not even courts in the full of the term, but are, in peace as well as in war, simply bodies litary men ordered to investigate accusations, arrive at facts, -where just—recommend a punishment. In the absence, fore, of statutory direction, they can scarcely be held bound e same strict adherence to common-law rules as are the true s of the United States;[1] and, upon trials, they may properly owed to pursue a more liberal course in regard to the admis- of testimony and the examination of witnesses than do, ually, the civil tribunals.[2] Their purpose is to do justice; f the effect of a technical rule is found to be to exclude ma- facts or otherwise obstruct a full investigation, the rule and should be departed from. Proper occasions, however, ich departures will be exceptional and unfrequent.

e subject of this Chapter will be presented under the sep- heads of:—I. Proof in general; II. Admissibility of Evi- e; III. Oral Testimony; IV. Written Testimony.

I. PROOF IN GENERAL.

ider this head will be noticed:—I. What is to be proved; low much is to be proved; III. What is to be presumed; What is to be judicially taken notice of.

I. What is to be Proved.

he Three Facts to be Established. Upon every crim- trial there are to be established three principal facts, viz.— t the act charged as an offence was really committed; That

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As the Court of Claims, for example, which, being *a court of the ed States*, is held to be bound, in the absence of statutory provision e subject, by the common-law rules of evidence. See the instruct- pinion of Bradley J., in Moore *v.* U. S., 91 U. S. 270.

Grant *v.* Gould, 2 H. Black. 104; Kennedy, 120; Tullock, 13; Bom- . 19; Pratt, 198; Lieut. Col. Fremont's Trial, 239–40, 256. "Courts- al had much better err on the side of liberality towards a prisoner by endeavoring to solve nice and technical refinements of the laws lence, assume the risk of injuriously denying him a proper latitude fense." G. C. M. O. 32 of 1872. And, to a similar effect, see G. ., Dept. of Dakota, 1871; Do. 23, Dept. of Texas, 1873; Do. 49, pt. of Cal., 1873; G. C. M. O. 60, Dept. of the Mo., 1874.

the accused committed it; That he committed it with the requisite criminal intent.

Proof of the commission. The *corpus delicti*[1] so-called, or the fact that the alleged criminal act was committed—by some one,[2] is, as a separate fact to be proved, especially illustrated in cases of homicide and larceny, and—at military law—in cases of offences under Arts. 5, 8, 13, 14, 17, 22, 26, 45, 46, 58 and 61. Here the fact that a person has been unlawfully killed, that property has been unlawfully appropriated, that a false return of muster has been made, that arms, clothing, &c., have been sold or through neglect lost, &c., that a mutiny has occurred, that a challenge has been sent, that the enemy has been relieved, that a fraudulent claim has been advanced, &c., is a distinct fact to be established independently of the fact of the agency of the accused. In the cases of another class of military offences, as desertion, cowardice, drunkenness on duty, sleeping on post, &c., the agency of the accused is so connected with the act done that proof of the latter is also proof of the former.

Proof of the agency and identity of the accused. This, as an independent fact, is especially material to be clearly shown where the offence was committed secretly or in the night time, or where the accused was a stranger to the witnesses, or was one of a number of persons associated together or, (by reason of their similar dress or otherwise,) not readily distinguished from each other.[3]

Proof of the intent. Crime, at common law, is made up of intent and act; the wrongfulness of the intent constituting

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1. Proof of this first essential is not done away with by the fact that the accused has confessed the offence. In other words proof of a confession does not prove the *corpus delicti*, but the latter must be independently proved before evidence of the confession can be admitted. 1 Greenl. Ev. § 217; G. O. 234, Fifth Mil. Dist., 1869; Do. 5, 48, Dept. of the Platte, 1871.

2. The term *corpus delicti* is sometimes referred to as including not only the criminal act but also the agency of the accused therein. See Wharton, Cr. Ev. § 325, 633. The definition of the text, (and see 3 Greenl. Ev. § 30,) is, however, preferred.

3. See case in G. O. 1, Dept. of the Platte, 1871, in which the proceedings were disapproved because the proof did not sufficiently connect the accused with the offence.

iminality of the act. To complete the legal crime, an in-
o effect the wrong and an act performed in pursuance of
intent must concur, and without this combination there can
) crime.[1] And if the wrongful intent is present, the wrong-
ct committed is a complete crime, though it may not be the
se act had in view.[2] Where the intent is shared in by several
ns, as in conspiracy, mutiny, &c., every one who has con-
ted to the intent, and at the same time engaged in the act,
minal.[3]

respect to the element of *intent*, crimes are distinguished as
rs:—those in which a distinct and specific intent, independ-
f the mere act, is essential to constitute the offence; and
in which the act is the principal feature, the existence of
rongful intent being simply inferable therefrom. Of the
r are murder, larceny, burglary, desertion and mutiny; of
tter arson, rape, perjury, disobedience of orders, drunken-
n duty, neglect of duty.[4] In cases of the former class the
:teristic intent must be established affirmatively as a sepa-
.ct; in the latter class of cases it is only necessary to prove
nlawful act, for every man is presumed in law to have
.ed to do what he actually does, and the burden of proof is
nim to show the contrary.[5]

:ts negativing intent. Under the head of the Defence,[6]
ve already considered certain facts and conditions, the effect
proof of which is to negative the existence of the element
ongful intent in alleged crime, or to show an incapacity to
ain such intent. These are such as Ignorance or mistake
, Ignorance of law, Drunkenness, Insanity, Compulsion by
ry orders or by hostile force, and Necessity of executing
ry discipline.

: subject of the *intent* will be further illustrated in consider-

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Greenl. Ev. § 13; 1 Bishop, C. L. § 285–287.

Bishop, C. L. § 327–329.

Bishop, C. L. § 630, 636.

Neglect in the discharge of a duty, or indifference to conse-
s, is in many cases equivalent to a specific criminal intention."
/. Thompson, 8 Sawyer, 122.

Greenl. Ev. § 13, 14.

ee Chapter XVII.

ing the specific offences which form the subjects of the differe Articles of war.

II. How Much is to be Proved.

Reasonable Doubt. In a civil action the plaintiff needs i general but to make out a *prima facie* case, or to offer evide preponderating over that of the defendant, to give him the ve dict or judgment. But the quantity of the proof required (on th part of the prosecution) is considerably greater upon crimin trials, where there exists always in favor of the accused the pre sumption of innocence—a presumption from which results th familiar rule of criminal evidence that, to authorize a convictio the guilt of the accused must be established *beyond a reasona doubt.* By "reasonable doubt" is intended not fanciful or inge ious doubt or conjecture, but substantial, honest, conscientio doubt suggested by the material evidence in the case. The mea ing of the rule is that the proof must be such as to exclude, n every hypothesis or possibility of innocence, but any fair a rational hypothesis except that of guilt; what is required bei not an absolute or mathematical but a "moral certainty."[1] court which acquits because, upon the evidence, the accused m *possibly* be innocent falls as far short of appreciating the prop *quantum* of proof required in a criminal trial, as does a co which convicts because the accused is *probably* guilty. Ho ever convincing the testimony, it is always possible that th accused may be innocent: on the other hand, though the prob

1. 3 Greenl. Ev. § 29; 1 Bishop, C. P. § 1093, 1094; Wharton, C Ev. § 1; Wills, Cir. Ev., 157; U. S. *v.* Douglass, 2 Blatchford, 21 U. S. *v.* Gleason, Woolworth, 128; U. S. *v.* Carr, 1 Woods, 486; U. S. Babcock, 3 Dillon, 621; Com. *v.* Webster, 5 Cush. 320; Com. *v.* Co ley, 118 Mass. 21; Com. *v.* Drum, 58 Pa. St. 22; Meyer *v.* Com., 83 131; Com. *v.* Carey, 2 Brewst. 304; G. O. 27, Army of the Poto 1864; Do. 46, Dept. of the Mo., 1864; G. M. C. O. 67, Dept. of C 1883; Manual, 71 § 42.

In U. S. *v.* Babcock, (p. 621–2,) Dillon J. observes:—"The defen ant, by the policy of our law, can neither be compelled nor permitted t testify. As a substitute for this deprivation, the law clothes the defe ant with a presumption of innocence which attends and protects h until it is overcome by testimony which proves his guilt beyond a reas ble doubt." This was said in 1876. *Quære,* whether the presum of innocence is any the less, or stronger evidence is required to jus reasonable doubt, when the accused takes the stand as a witness u the Act of March 16, 1878.

ies may favor his guilt, a material and sensible doubt of the : may exist of which he is entitled to the benefit.

is to be observed that the general rule indicated applies alike ch of the three main facts to be established upon a trial— *corpus delicti*, the identity of the accused with the real der, and the requisite criminal *animus*. Each must be ed beyond a reasonable doubt.[1] The rule is equally applica- o military as to civil prosecutions.[2]

III. WHAT IS TO BE PRESUMED.

esumption in General—Kinds of Presumption. It served by Bishop[3] that the whole law of evidence rests upon imptions, and it has been said by Wills[4] of *proof* itself that "nothing more than a presumption of the highest order." esumptions are most simply divided into *presumptions of law presumptions of fact.*

esumptions of law. These are general propositions es- shed by the law, which are accepted without evidence by the s as being either "absolutely" or *prima facie* true, and are distinguished as "conclusive" and "disputable."[5] *Conclu-* presumptions are inferences of the law in regard to which, is expressed by Greenleaf,[6] "all corroborating evidence is nsed with and all opposing evidence is forbidden." Of these f the most familiar is, that every sane person, who is a free , is "conclusively presumed to contemplate the natural and ible consequences of his own acts."[7] So, according to the

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"It is incumbent on the Government to prove beyond reasonable the truth of every fact in the indictment necessary in point of law istitute the offence." Curtis J., in U. S. *v.* McGlue, 1 Curtis, 2.

Courts-martial, being, as criminal courts, bound by the rules of ial evidence, "ought not to convict the prisoner until all reasona- ubt of his guilt is removed; allowing the presumption of innocence, cases, to operate in his favor." 3 Greenl. Ev. § 469.

1 C. P. § 1096.

"Circumstantial Evidence," p. 32.

1 Greenl. Ev. 14. Some later writers do not approve this distinction, ground that few if any presumptions can be said to be absolutely isive. See the subject discussed in Wharton, Cr. Ev., Ch. XIV; Bishop, C. P. § 1099, 1100.

Greenl. Ev. § 15.

Greenl. Ev. § 18; 3 Id. § 14. "The law makes a man answerable n the unexpected consequences of his crimes; and for this pur-

earlier authorities, an infant under seven years is "conclusi presumed incapable" of committing a felony.[1] There is the conclusive presumption in favor of judicial proceedings, the records of courts of justice have been correctly made Among *disputable* presumptions, (where the inference, th more or less strong, is not absolute but may be overcom counter evidence,) are—the presumption in favor of the inno of every person accused of crime;[3] the presumption in fav the sanity of persons in general, and, on the other hand presumption that unsoundness of mind, (not accidental or porary, as upon disease or drunkenness,) proved to have e at a previous date, has continued;[4] the presumption of o ship arising from the open possession of property;[5] the pres tions as to public officers, that they are legally in office, and they properly perform their duties[6]—presumptions espe applicable to the military service.[7]

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pose imputes the intention to produce the consequence as well original act." State *v.* Cooper, 1 Green, 361. But see 1 Bishop, § 1100.

1. 1 Greenl. Ev. § 28; 3 Id. § 4.

2. 1 Greenl. Ev. § 19.

3. Warren, (p. 19,) says of this presumption: "It alone can against first impressions, prepossesions and prejudices."

A further presumption may here be noted—that in favor of the d ter of a *witness* till impeached. Johnson *v.* State, 21 Ind. 329.

4. Greenleaf, (1 Ev. § 42,) cites these two presumptions as ill tions of the more general one, that—"The opinions of individuals entertained and expressed, and the state of mind once proved to are presumed to remain unchanged until the contrary appears." Sleeper *v.* Van Middlesworth, 4 Denio, 431, the court designat presumption as one "against any sudden change in the moral, a as the mental and social, condition of man."

5. 1 Greenl. Ev. § 34.

6. It is "a presumption that one who publicly performs official tions holds the office in fact; and no record or other like proof appointment is, in the first instance, required. * * * Officia sons are presumed to have done their duty." 1 Bishop, C. P. § 1131. And see 1 Greenl. Ev. § 40, 83, 92, 195, 207.

There are also the presumptions, founded upon the course c cial public business, that certain results will follow if certain con are complied with. Thus if a letter is shown to have been dep prepaid and properly addressed in the post office, it may be pres in the absence of rebutting evidence, that it reached its destinati was received. In U. S. *v.* Babcock, 3 Dillon, 571, the court a the same rule to telegraphic dispatches.

7. Thus, on the trial of an officer or soldier, it is not necessary

ptions of fact. These are simply inferences as to ce of a fact derived from some other fact or facts, in- t deduced by the law but by the human reason. Vary- e circumstances of every case, they are not peculiar investigations, but illustrate the ordinary operations lect in arriving at conclusions in general. Applied cases, they are inferences as to the fact of the guilt ce of the accused deduced from minor facts and cir- , physical and moral. They do not constitute or ex- ed legal principles, but "are in truth but mere argu- hich the major premise is not a rule of law."[1]

tory and exculpatory presumptions. Of this e "*inculpatory*" presumptions, derived from collateral ces and declarations indicating a motive for crime, rations for the commission of crime, from failure to tisfactorily for suspicious appearances, from acts ap- hibiting a criminal consciousness, (as concealment, flight,) from the suppression, destruction, simulation, on of evidence, from attempts to prevent a fair trial, eavors to suborn or bribe witnesses, &c.,[2]) as well as merous *physical* circumstances—such as impressions ks, blood on garments, possession of weapons or in- likely to have been used in the commission of the ession of property recently in the possession of the the larceny, violence, &c.—which go to identify an the guilty party. Of this class also are various pre- similarly deduced but of an "*exculpatory*" character.

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mmission, or prove the official character or rank, of the produce the enlistment paper, or prove the formal enlist- soldier. It is sufficient to show that the officer has publicly en recognized as such, and that the soldier has received pay l service as such. 3 Greenl. Ev. § 483; Lebanon *v.* Heath, 9; O'Brien, 171. The rule of presumption of due appoint- from the exercise of the office "would appear to apply with rce to military than to civil officers." Jones *v.* Johnson, 260.

Ev. § 44. And see Id. § 48.

uccessful attempt to establish an *alibi* has sometimes been ding an inculpatory presumption against an accused; but robably such a failure should no more give rise to an un- esumption than a failure to make out any other defence. People, 39 Ills. 457.

Such are—the absence of apparent motive to commit the cri the presence of a strong motive not to commit it, the fact of j vious exemplary character, or of conduct and deportment, apparently reconcilable with guilt, the appearance of malic falsehood on the part of the prosecuting witness, &c.[1]

Presumptions and "circumstantial" evidence. above are some of the presumptions of fact, which, in ne every criminal case not established by direct testimony, comb (for they rarely arise separately,) to induce the conclusion e of guilt or the reverse. And it is the various grounds of t presumptions, such as have been specified, which mainly co tute the material of *Circumstantial* as opposed to *Direct* dence; the latter being the evidence, (comparatively rarely att able in criminal trials,) of witnesses who testify from pers knowledge derived from the senses, as from seeing or hear the former the evidence furnished by the great variety of m facts, circumstances and indications connected with or rela to the principal fact of the crime committed, and affording sumptions, more or less strong or weak, of the guilt or innoc of the accused.[2]

IV. WHAT IS TO BE JUDICIALLY TAKEN NOTICE OF.

We find further, in entering upon the subject of eviden many facts of a conspicuous, general, or public character, wh so authenticate themselves in law that the courts take judic notice of their existence as matters of course, and which are r required either to be charged or proved. These, which have ready been referred to in the Chapter on the Charge,[3] are su as—The laws of nations and of war, the provisions of the Co stitution, public statutes and executive proclamations, the sy tem and framework of the Government, the powers of the Pre dent and of the heads of the executive departments, matters public history, the geographical features of the country, sit tion of military departments, posts, &c. Military courts w also accept as authentic, without proof of their authority, published "general" orders, circulars, and usually "specia

1. See Wills, Ch. III, IV and V.
2. See 1 Greenl. Ev. § 13; Wills, 15, 16.
3. See Chapter X.

lers, emanating from the War Department or Headquarters of : Army, or from the headquarters of the different military isions and departments of the army.[1] So, regimental or gar- on courts will properly take judicial notice of the formal pub- ied orders of the commander of the regiment or post. Facts hin the common observation and knowledge of men will also judicially taken notice of by military equally as by civil tri- ials.[2]

II. ADMISSIBILITY OF EVIDENCE.

This subject will be considered under the following heads:— General rules governing the admission of testimony; II. Hear- ; III. Confessions; IV. Evidence excluded from considera- is of public policy.

General Rules Governing the Admission of Testimony.

The Three Principal Rules. These, (which are the more ectly illustrated by the testimony on the part of the *prosecu-* ,) may be stated as follows: 1. The evidence must be relevant; The burden of proof of guilt is always on the government; The best evidence must be produced of which the case is sus- tible.

1. ***The evidence must be relevant.*** The testimony offered the *prosecution*, whether oral or written, must be relevant, that o say must be apposite to the material averments of the indict- nt or charge and be such as to establish or tend to establish commission of the offence alleged; otherwise, it may be ob- ted to as "irrelevant" or "immaterial," and, upon such objec- n, will, in general, properly not be admitted by the court.[3] The

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. See G. O. 121, Second Mil. Dist., 1867. A *civil* court, however, not take judicial notice, without proof, of the orders issued by a mili- r department commander. Burke *v.* Miltenberger, 19 Wallace, 519.

. It is not necessary to prove facts which the jury may be presumed know as well as any witness, or which are "within the ordinary ob- vation of all men." Kraus *v.* R. R. Co., 55 Iowa, 338–9.

. It need hardly be remarked that the exclusive authority to decide n the relevancy of testimony, whether objected to by a party or by ember, rests with the Court. A witness, of whatever rank, on a ary trial, has no authority to pass upon the relevancy or compe- y of his own evidence. In G. O. 1, Dept. of the South, 1869, Gen. de, in disapproving certain proceedings of a court-martial, com-

testimony, to be admissible, need not indeed *directly* or *immediately* sustain the charge provided it merely "constitutes a link in the chain of proof;"[1] and evidence offered which is seemingly irrelevant and is objected to as such may yet be admitted by the court, if persuaded by the representations of the party offering it that it will be rendered relevant by other testimony to be subsequently introduced.[2]

To be relevant, the evidence must be confined to the issue of the case: evidence as to the commission or attempted commission by the accused, at another time, of an offence quite independent of and distinct from that charged, though of the same sort, is in general irrelevant and inadmissible.[3] Where, however, two or more criminal acts or attempts have been committed by the accused at the same time, or as parts of the same transaction or system, evidence in regard to the one may be relevant as illustrating the commission of the other.[4] So, evidence of collateral facts—as declarations or acts of the accused, or an accomplice, made or done before, or even after, the commission of the offence charged—may sometimes be relevant and admissible as tending to prove *intent* or *guilty knowledge*.[5]

But though evidence, to be admissible, must tend to prove the issue, yet, except as to matters of essential description, it is

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ments as follows:—"The court, on the application of the defence, directed a witness" (an officer) "for the prosecution to produce a copy of a certain paper, which he refused to do on the ground that it was the business of the defence to produce the original. The witness thus assumed the functions of the court in deciding upon the relevancy of the evidence, and his refusal was disrespectful and a grave breach of discipline."

1. 1 Greenl. Ev. § 51 *a*; Thompson *v.* Bowie, 4 Wallace, 471.

2. 1 Greenl. Ev. § 51 *a*; U. S. *v.* Flowery, 1 Sprague, 109; G. O. 41, Dept. of the Platte, 1870. Such evidence is sometimes admitted, "subject to the proof to be given hereafter;" that is to say subject to be accepted and retained, or rejected, in the end, according as subsequent testimony may or may not show it to be relevant. See Kelly *v.* Crawford, 5 Wallace, 790.

3. The purpose of such testimony, as generally offered, *viz.* to raise an *inference* that the accused committed the similar act charged in the indictment, cannot be recognized as legitimate. See People *v.* Jones, 31 Cal. 565.

4. 1 Greenl. Ev. § 52, 53; Wharton, Cr. Ev. § 32, 38, 49; Wills, 44; Manual, 65 § 21. The collateral offence must form "a link in the chain of circumstances or proof relied upon for conviction." Swan *v.* Com., 104 Pa. St. 218.

5. Manual, 66 § 22–25.

ant and sufficient if it supports only *substantially* the alle-
ns of the charge.[1] Mere surplusage in the charge need not
›ticed in the proof, and averments which are formal merely
ımaterial need not be proved as laid. Thus the formal aver-
in an indictment for homicide, that the killing was done
a particular weapon, need not be verified by the evidence,
t will be enough to show that any other deadly weapon was
oyed.[2] So of the allegations of time, place, quantity, qual-
ıd value—the rule as to relevancy does not require strict
';[3] and this especially in military cases in view of the au-
ty of courts-martial to except and substitute in their find-
As to time and place in military specifications, while these
sometimes require to be more precisely distinguished—as
e a series of distinct offences of the same class are alleged
ıve been committed on separate days—it is in general suffi-
: if the time be shown to have been within the legal period
mitation,[4] and the place within the jurisdiction of the court,
is to say within the United States.
he rule as to relevancy applies also to the *defence*. Whether
mony on the part of the accused is or not relevant must be
mined by the nature of the defence in each case. In a
tary case, not only is such testimony relevant as goes to the
of the particular defence, but also such as may establish
character or avail to extenuate the punishment in case of
iction.

***The burden of proof of guilt is always on the prose-
on.*** It is a general rule of evidence that "the obligation of
ng any fact lies upon the party who substantially asserts the
ıative of the issue."[5] And upon a criminal trial, where
stands at the threshold the presumption of the innocence
: accused, and the affirmative of the issue is thus necessarily
ted by the Government, the burden is imposed upon the
cution of proving the existence of every material fact re-
d to establish the offence charged. The *onus probandi* is

ı Greenl. Ev. § 56, 63.
: Greenl. Ev. § 59.
Greenl. Ev. § 61.
As to the rule in civil prosecutions, see McBryde *v.* State, 34
›3.
Greenl. Ev. § 74.

not always confined to the proof of a proposition affirmat[illegible] form. The gist of the offence may be a criminal neglect [illegible] here the prosecution is called upon to prove a negative. [illegible] more frequently occurs in military than in civil cases, seve[illegible] the Articles of war making punishable in terms the not [illegible] of some duty incidental to the military status, or the doi[illegible] some act without the authority of the proper superior. O[illegible] the other of these negative elements may be perceived in of[illegible] designated in Arts. 7, 15, 16, 17, 23, 31, 32, 33, 34, 35, 40, [illegible] 69; but it is the general charge laid under Art. 62, of "n[illegible] of duty to the prejudice of good order and milita[illegible]y discip[illegible] that most conspicuously illustrates the frequency of the o[illegible] tion to prove a negative which is imposed upon the gover[illegible] in military cases. Yet the negative here is really but an a[illegible] tive in another form.

The burden of proof of guilt never shifts from the side [illegible] prosecution. The accused may indeed admit the commiss[illegible] him of the act charged, claiming that it did not constitute [illegible] offence on his part because of the existence of a certain fact [illegible] he sets up as a defence. Asserting this defence the burden [illegible] upon him to maintain it. But the onus of proving *guilt* remai[illegible] with the State, and if the accused so far makes out his defence [illegible] to involve the main issue in a reasonable doubt, the prosecuti[illegible] must dispel this doubt by further evidence, in order to obtain [illegible] conviction.[2]

3. The best evidence must be produced of which the case is susceptible. The rule that proof is to be made by the highest existing evidence is one of *quality* not of *quantity*.[3] It does not require that the greatest amount of evidence should be accumulated for the proof of any fact, but only that every allegation should be established by the best, that is to say most authoritative and legally satisfactory, evidence of which the case is capable. But again the rule does not mean that indirect or circumstantial evidence, or evidence of less strength, is to be rejected where direct evidence or evidence of greater strength exists and may be produced; for indirect, weak, or imperfect

1. 1 Greenl. Ev. § 80.
2. See, in this connection, 1 Bishop, C. P. § 1050, 1051.
3. See Manual, 71 § 41; Id. 73 § 44.

ce is equally admissible in law with direct, strong, or full ce, provided only it be relevant. What is meant is that, the evidence actually offered indicates of itself the exist- f higher evidence for which it is clearly only a substitute, bstitutional evidence is incompetent and not to be admitted ected to.[1]

e familiar application of the principle is to cases in which d evidence or other *written* evidence exists of a material which is attempted, in the course of the trial, to be established *ral* testimony. Where such testimony, as offered, discloses fact of the existence of the written proof which the law re- ls as of higher quality, (or where such fact has been disclosed the pleadings or by previous testimony,) the secondary evi- nce may be objected to, and, upon objection, will properly be cluded.[2] Thus, in proving a charge of perjury or false swearing, mmitted at a military trial, the record of the trial is clearly the st evidence of the testimony given by the accused, and parol vidence of the same, unless introduced by consent, will be inad- nissible.[3] The rule excluding the oral testimony in such cases adopted not only because the writing must necessarily afford he most satisfactory evidence of the facts which it sets forth, but lso, as Greenleaf observes, "for the prevention of fraud;" since, he adds, "whenever it is apparent that better evidence is with- eld, it is fair to presume that the party has some sinister motive r not producing it, and that, if offered, his design will be frus- ted. The rule thus becomes essential to the pure adminis- tion of justice."[4]

. "The rule of law is that the best evidence must be given of which nature of the thing is capable; that is, that no evidence shall be re- ed which presupposes greater evidence behind, in the party's pos- ion or power." Marshall, C. J., in Tayloe *v.* Riggs, 1 Peters, 596; reenl. Ev. § 82, 84; Manual, 68 § 30. The two sorts of evidence s related are sometimes termed "primary" and "secondary." Even n secondary evidence is obliged to be furnished, it must be the best party has it in his power to produce under the circumstances. Cor- v. Williams, 20 Wallace, 226.

That written *post orders* are not properly provable by parol, if it is ticable to produce them, see G. O. 60, Third Mil. Dist., 1867; Do. Dept. of the South, 1869.

See recent case in G. C. M. O. 93, Dept. of the East, 1884.

1 Evidence § 82. And see U. S. *v.* Reyburn, 6 Peters, 367; Man- 8 § 30. "The withholding of the better evidence raises a presump-

But it may happen that oral testimony may be the original and best evidence as to a fact or facts when a statement of the same exists in writing. Thus where certain facts within the knowledge of the writer, and material to the issue in a case on trial have been *recited* in an official endorsement, certificate, communication, or other writing, the primary and best evidence of such facts will be not the writing but the personal statement under oath and subject to cross-examination, of the writer, and if he can be obtained as a witness, the written statement should not be received.[1]

Exceptions. To the general rule, however, there are certain exceptions, growing out of considerations of public policy and convenience, or out of the necessities or peculiar circumstances of the case. Thus public records and documents may be proved by *copy*, as will be hereafter indicated. A further exception has been admitted where the charge is to be proved out of voluminous or complicated accounts or similar documents, the introduction and inspection of which in court must be attended with great inconvenience, or entail unreasonable delay. Here an accountant or other competent person who has made the proper examination may be introduced to testify to the contents of the writings,[2] and schedules prepared and verified by him may also be admitted.[3]

Lost or destroyed writing. An occasion for the substitution of secondary evidence is also presented where a material

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tion that, if produced, it might not operate in his favor." Tayloe v. Riggs, *ante*.

It is the duty of the court to see that the *best evidence* is procured if practicable, and where a witness, having important and material papers in his possession, refuses to appear and produce them, the court will properly call upon the judge advocate to *attach* him if necessary. S. G. C. M. O. 32, Dept. of the Columbia, 1882.

1. See G. O. 28, Dept. of the South, 1864; Do. 39, Dept. of the Susquehanna, 1864; Do. 45, Dept. of the East, 1872.

2. 1 Greenl. Ev. § 93.

3. R. R. Co. *v.* Dana, 1 Gray, 83. Greenleaf, (vol. 1 § 94.) adds: "Under this head may be mentioned the case of inscriptions, on walls and fixed tables, mural monuments, gravestones, surveyors' marks on boundary trees, &c., which, as they cannot conveniently be produced in Court, may be proved by secondary evidence." Otherwise, when a thing of this nature can be conveniently brought into court; as a *prima notice*, not affixed to the freehold but merely hung up in an office. Jones *v.* Tarlton, 1 Dow. P. C. (N. S.) 625.

g has been *lost* or *destroyed.*[1] A party proposing to prove ondary evidence a writing which has been *lost*, must prop- rst offer some evidence that a paper of the character has l, and that a "*bona fide* and diligent search has been un- sfully made for it in the place where it was most likely to ınd, if the nature of the case admits of such proof."[2] : the paper was lost out of the party's own custody, his ·it as to the fact and circumstances of the loss may be ted in evidence,[3] or he may be allowed to be sworn to the ı court.[4] Where the paper has been *destroyed*, the fact of :vious existence and of the circumstances of its destruction be shown,—(and the affidavit, or statement on oath before ourt, of the party, is admissible, if the facts rest in his ledge alone,)—before secondary evidence of its contents ecome competent.[5]

per in adverse possession—Notice to produce. A :r instance in which secondary testimony as to a writing may

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[1] Secondary evidence of the contents of written instruments is ad- le wherever it appears that the original is destroyed or lost, by ıt, without any fault of the party." Remer *v.* Bk. of Columbia, :aton, 581. And see U. S. Reyburn, 6 Peters, 365; U. S. *v.* 12 Peters, 1; Williams *v.* U. S., 1 Howard, 290. In U. S. *v.* Lyon, ch C. 309, the court refused to receive parol evidence of the con- f a written *challenge*, in the absence of evidence that the same en lost or destroyed.

Greenl. Ev. § 558. Slight evidence of the previous *existence* of ›er is sufficient. Id. § 349, 558. "It seems that in general the s expected to show that he has in good faith exhausted, in a ıble degree, all the sources of information and means of discovery the nature of the case would naturally suggest and which were ›le to him." Id. § 558. And see Kelsey *v.* Hanmer, 18 Conn. 'oster *v.* McKay, 7 Met. 531.

Greenl. Ev., 349, 558; Foster *v.* McKay, *ante;* Allen *v.* Blunt, 2 & Minot, 121; Maye *v.* Carberry, 2 Cranch C. 336.

itch *v.* Bogue, 19 Conn. 285; Vedder *v.* Wilkins, 5 Denio, 64. ıtement of the accused, when thus presented, is not in the nature testimany of a witness to the merits of the case, but formal and nary merely and addressed to the discretion of the court,—as in ance of the swearing by a party to his having given notice to pro- ıpers, (see *post,*) or to an affidavit for a continuance to procure ny.

:e authorities cited in the two preceding notes; also Pillow's Case, of Inquiry,) p. 30–31. Upon the waiver of the opposite party, ple statement of a party as to the fact of loss or destruction, (un- anied by his oath,) may be accepted by the court, in its discre- sufficient.

be introduced in lieu of the writing itself is presented where the paper or document desired to be put in evidence is *in the possession or under the control of the adverse party.*[1] For the admission of such testimony a foundation must be laid, by the party proposing to avail himself of the evidence, by a showing on his part that he has done all that the law requires of him to induce the production of the original. What the law requires is, that he shall first give a notice to the adverse party, (or his attorney,) to produce the original in court, to be admitted and used in evidence.[2] The notice should generally be in writing, and should clearly describe the paper or document called for so that it cannot be mistaken.[3] It should ordinarily be served, if practicable, before the trial, so that there may be ample opportunity for complying with it:[4] if the occasion, however, for using the evidence does not arise till during the progress of the trial, the notice may be served at that time, and, unless required by the adverse party to be in writing, may be given verbally in the presence of the court.[5]

The proper time for calling for the *production* of writings,

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1. "If papers are in the possession of the opposite party, due notice for their production should be given; after which, if not produced, secondary evidence may be given of their contents." Simmons § 1035.

2. 1 Greenl. Ev. § 560, 562; U. S. *v.* Winchester, 2 McLean, 135; Allen *v.* Blunt, 2 Wood. & Minot, 121; Maye *v.* Carberry, 2 Cranch C. 33; Underwood *v.* Huddlestone, Id. 76. The party must not only give notice to produce, but must prove the existence of the original, and must show that the instrument is in the hands or power of the opposite party. That it is so, "very slight evidence will raise a sufficient presumption, where the instrument belongs to him, or has been or should regularly be in his possession, or in that of his agent or other person in privity with him. 1 Greenl. Ev. § 560, note.

The fact that the adverse party or his attorney actually has the paper in court does not dispense with the usual notice. See 1 Greenl. Ev. § 561, note.

3. 1 Greenl. Ev. § 562; Rogers *v.* Custance, 2 M. & Rob. 179; Jacob *v.* Lee, Id. 33.

4. See 1 Greenl. Ev. § 562; Choteau *v.* Raitt, 20 Ohio, 132; Emerson *v.* Fisk, 6 Greenl. 200.

5. See Smith *v.* Young, 1 Campb. 440. A voluntary offer by the adverse party to produce the paper is a waiver of notice. Dwinell *v.* Larrabee, 38 Maine, 464.

If it becomes necessary to *prove* the fact that notice was given, this may be done by the affidavit, or statement in court under oath, of the party, or of his counsel or other person through whom it was communicated or served.

ce which notice has been given, is held to be—"not until rty who requires them has entered upon his case."[1]
ıas been held by a United States Court that books and s produced under notice must be allowed to be used by the side *unconditionally;* else parol evidence of their contents be given.[2]

II. HEARSAY.

le of Exclusion. Intimately connected with the rule last lered, requiring the production of the "best evidence," is which excludes the species of secondary evidence known as *ıy.* "The term 'hearsay,'" says Greenleaf,[3] "is used with nce to that which is written as well as to that which is n; and, in its legal sense, it denotes that kind of evidence does not derive its value solely from the credit to be given witness himself, but rests also, in part, on the veracity and tency of some other person." Such evidence, in the words ief Justice Marshall,[4] "is incompetent to establish any c fact which is in its nature susceptible of being proved by sses who speak from their own knowledge." This kind of ıony is uniformly held inadmissible, not only on account of rinsic uncertainty growing out of the fact that it consists tter repeated at second hand at least, as well as because it nes the existence of better testimony and because it may as a cover to fraud and perjury, but especially because it uces into the case statements the truth of which cannot be by the criterion of cross-examination.[5]

'Until which time the other party may refuse to produce them, and ss-examination as to their contents is usually permitted." 1 Greenl. 563. It may be noted here that it is held that, after notice and re- produce a paper, and secondary evidence thereupon given of its ts, the adverse party cannot be permitted to produce it in evidence of his own case. Doe *v.* Hodgson, 12 Ad. & El. 135.

arr *v.* Gale, 3 Wood. & Minot, 38.

Evidence § 99. And see Manual, 73 § 46, 77 § 59.

ueen *v.* Hepburn, 7 Cranch, 295.

ı Merritt *v.* Mayor, 5 Cold. 95, it was remarked by the court that— clarations and conversations of *military officers* are not exempted ıe common rules of evidence, but are mere hearsay and excluded e of ordinary citizens.' Otherwise, of course, where they are a the *res gestæ.* See *post.* The introduction of mere hearsay evi- by courts-martial has been repeatedly disapproved by reviewing See instances in G. O. 118, Dept. of the East, 1870; Do. 34, f Dakota, 1874.

Hearsay Distinguished from Original Testimon is to be noticed that the statements of a third person a always hearsay, but may constitute original facts, as pro admissible as any other original testimony. Thus where a tion at issue in the case is whether certain words were act spoken (or written) by a person other than the witness, or wh a certain confession or admission was made by such pers recital by the witness of the words or terms employed, is orig testimony and an objection to its admission should be overru So, in a military case, where the question is whether a cer order of a superior which the accused is charged with disobe was actually given, a witness other than such superior ma admitted to testify as to the facts and terms of the order.[1]

Res Gestæ. Other declarations of third persons which admitted in evidence as being not hearsay but original testim are those which fall within the class of the "*res gestæ*," as legal phrase is. By the *res gestæ* is meant the circumsta contemporaneous with the principal fact at issue, or so ne contemporaneous with it as to constitute a part of the same eral transaction, which explain and elucidate such fact by i cating its nature, motive, purpose, &c.[2] Such are thr declarations and conduct of the accused in connection with commission of the crime charged and indicating his inten knowledge; declarations of the party injured as to the fact of violence committed; language of accomplices; cries of byst ers in concert with the accused or party assailed by him; decl tions of *agents* in regard to pending transactions, &c. O circumstances admissible in evidence as of the nature of *gestæ* are the words and acts of third persons—seconds for ex ple—which go to indicate whether a certain communication

1. So, where the question is, whether the party acted prudently, wi or in good faith, the *information* on which he acted, whether true or f is original evidence. 1 Greenl. Ev. § 101. The rule, it may be n here, "does not exclude evidence as to statements made in the pres of the prisoner." Manual, 74 § 48.

2. Beaver *v.* Taylor, 1 Wallace, 642; U. S. *v.* Roudenbush, Bald 514; State *v.* Keene, 50 Mo. 357; Blount *v.* State, 49 Ala. 381; I *v.* State, 44 Miss. 731; Wharton, Cr. Ev. § 263. Declarations of in evidence as *res gestæ* must be shown to be voluntary and spontan and made so near in time to the principal transaction as to preclud idea of deliberate design. People *v.* Vernon, 35 Cal. 49.

enge to fight a duel, or an acceptance of a challenge, in tion of the 26th Article of war.

xception to Rule excluding Hearsay—*Dying declarns in cases of homicide.* Under indictments for murder manslaughter, the law recognizes an exception to the rule cting hearsay, by allowing the dying declarations of the vic- of the crime, in regard to the circumstances which have in- ed his present condition, and especially as to the person by m the violence was committed, to be detailed in evidence by who has heard them.[1] It is necessary, however, to the com- ncy of testimony of this character that the person whose ds are repeated by the witness should have been *in extremis* under a sense of impending death, *i. e.* in the belief that he bout or soon to die;[2] but it is not necessary that he should self *state* that he speaks under this impression provided the is otherwise shown.[3] And if this belief on his part suffi- ntly appears, it is not essential to the admissibility of his words : death should have immediately followed upon them.[4] On other hand if, in uttering the words, he was under the im- ssion that he should recover, the same would be inadmissible a if in fact he presently died.[5] But it is no objection to their issibility that they were brought out in answer to leading stions,[6] or upon urgent solicitations addressed to him by any on or persons;[7] and if, instead of speaking, he answered the

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"As the testimony of an accomplice is admissible against his fel-, the dying declarations of a *particeps criminis* in an act which re- d in his own death are admissible against one indicted for the same der." 1 Greenl. Ev. § 157. So, the dying declarations of a third on, mortally wounded by the same shot that killed the deceased, are issible in evidence against the person charged with the homicide e latter." State *v.* Wilson, 23 La. An. 558.

"The persons whose declarations are thus admitted are considered nding in the same situation as if they were sworn; the danger of nding death being equivalent to the sanction of an oath." 1 Greenl. § 157.

Greenl. Ev. § 158; People *v.* Sanchez, 24 Cal. 17; Wills *v.* State, la. 21.

See Rakes *v.* People, 2 Neb. 157.

See 1 Greenl. Ev. § 158.

The statement, as to its admissibility, is to be governed by the rules as other testimony, except only that it may be elicited by ing questions. People *v.* Sanchez, 24 Cal. 17.

1 Greenl. Ev. § 161 *a*; Vass' Case, 3 Leigh, 852.

questions by intelligible signs, these signs may equally be te fied to.[1] But it is held that only such declarations are admissi as would be admitted if the party were himself a witness; that where the language employed is irrelevant or consists in statement of *opinion* instead of fact, it cannot be received.[2] N can it be received unless complete in itself; as where the decla tion is left incomplete and uncertain because interrupted by deat If it was put in writing at the time, the writing should be p duced.[4]

It is to be remarked that evidence of dying declarations, m as such usually are under circumstances of mental and physi depreciation, and without being subjected to the ordinary le tests, is generally to be received with great caution.[5]

III. Confessions.[6]

Different Kinds of Confession. Confessions are said to *judicial* or *extrajudicial*. The former are those made in court, by the plea of guilty; the latter are all those which are m elsewhere than in court. They are also *express*, as when made the accused in specific terms either orally or in writing; or *impli* as where they are deduced from his silent acquiescence in st ments in regard to his alleged offence, made in his presence others, when there is nothing to prevent his contradicting, qu

1. 1 Greenl. Ev. § 161 *b*; Com. *v.* Casey, 11 Cush. 417.

2. Binns *v.* State, 46 Ind. 311; State *v.* Quick, 15 Rich. 342; U. S *v.* Veitch, 1 Cranch C. 115; 1 Greenl. Ev. § 159.

3. 1 Greenl. Ev. § 161 *a*; Vass' Case, 3 Leigh, 786.

4. As being the "best evidence." State *v.* Cameron, 2 Chand. 172

5. 1 Greenl. Ev. § 162; Manual, 74 § 49. In Murphy *v.* State, Ills. 447, the dying person was under the influence of morphine and to be aroused to get his statement out. In People *v.* Knapp, Edmo 177, it is noticed that the evidence is especially unsatisfactory where appears that the deceased was a person of bad character who might, his declaration, have charged the accused with the crime through m tives of hostility and revenge.

6. The subject of Admissions, as distinguished from that of Confe sions, pertains rather to civil suits than to criminal proceedings. It enough to note here that all facts admitted by either party, or obvio assumed on the trial, are to be regarded as being as much in the case if they had been expressly proved. See Kennedy, 172; Paige *v.* zackerly, 36 Barb. 392.

ing, or otherwise replying to, such statements.[1] But of course e evidence of such acquiescence must be very clear and positive assign to it the efficacy of a confession.[2]

Admissibility of Confessions. As to the requisites to the mission in evidence of *extrajudicial* confessions—it has been en, in the first place, that a confession cannot be admitted in idence till the *corpus delicti*—the fact that the alleged criminal t was in fact committed, by somebody—is proved.[3]

In the second place, it is held that a confession, to be admitted, ust be offered in its *entirety*, so that the whole may be taken tother, and the complete purport may fully appear. If a material rt is withheld the part offered should not be admitted.[4] A dge advocate upon a military trial may desire to keep out of ght a portion of a confession because it implicates parties other an the accused; but this is a reason not recognized as sufficient law since a confession is not evidence against any person (not accomplice) other than the one who makes it.[5] The judge vocate may prefer not to discover a certain portion of the conssion, on the ground that it is erroneous or unsatisfactory; but is also is not a sufficient reason, since he is at liberty to conidict such portion by other evidence. He must, therefore, nless objection is waived,) introduce the entire confession or holly withhold it.

But the most familiar requisite to the admissibility of a conssion is that it must have been *voluntary*;[6] and the *onus* to show

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1. See 1 Greenl. Ev. § 215; Wharton, Cr. Ev. § 680; Kelley *v.* ople, 55 N. Y. 565; G. O. 48, Dept. of the Platte, 1871.

2. The mere fact, for example, that the accused remains silent *when estioned* as to the offence committed, is not to be regarded as equivnt to a confession in law. See Campbell *v.* State, 55 Ala. 80; DIGEST, 8. In Marvin *v.* Dutcher, 26 Min. 391, it is held that where it is not e *duty* of a person to speak as to the existence of an alleged fact, his ence cannot be taken as an admission against him.

3. See *ante*—"What is to be proved."

4. 1 Greenl. Ev. § 217; U. S. *v.* Wilson, Baldwin, 78. G. O. 48, pt. of the Platte, 1871. "If a confession is given in evidence, the ole of it must be given, and not merely the parts disadvantageous to e accused person." Manual, 81 § 80.

5. The mere fact that two persons are charged and tried *jointly* does t render a confession made by one admissible in evidence against the er. State *v.* Weesel, 30 La. An. 919.

6. See cases in U. S. Courts, cited in note to DIGEST, 258 § 13.

that it was such is upon the prosecution in offering it.[1] A confession is, in a legal sense, "voluntary" when it is not induced or materially influenced by hope of release or other benefit, or fear of punishment or injury, inspired by one in authority; or more specifically, where it is not induced or influenced by words or acts,—such as promises, assurances, threats, harsh treatment or the like,—on the part of an official or other person competent to effectuate what is promised, threatened, &c., or at least believed to be thus competent by the party confessing.[2] And the reason of the rule is that where the confession is *not* thus voluntary, there is always ground to believe that it may not be *true*. On the other hand, a confession induced by an indifferent or unauthorized person—one, (as it is expressed in the Manual,[4]) "hav

1. Nicholson *v.* State, 38 Md. 140, and cases referred to in last note. See also the principle illustrated in military cases published in the following Orders: G. C. M. O. 3 of 1876; G. O. 31, Dept. of Florida, 1869; Do. 54, Dept. of Dakota, 1867; Do. 5, Fifth Mil. Dist., 1868; Do. 4, Dept. of the Platte, 1871; G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881. "The course of practice is to inquire of the witness whether the prisoner had been told that it would be better for him to confess, or worse if he did not; or words to that effect." G. O. 4, Dept. of the Platte, 1871.

2. "Of course such inducement must be held out by some one who has, or who is supposed by the accused to have, some power or authority to assure him the promised good, or cause or influence the threatened injury." Shaw C. J., in Com. *v.* Morey, 1 Gray, 461. And see Com. *v.* Taylor, 5 Cush. 610; U. S. *v.* Pocklington, 2 Cranch C. 293; Cady *v.* State, 44 Miss. 332; Joy on Confessions, 5, 23; 1 Greenl. Ev. § 222; Wharton, Cr. Ev. § 650, 651; Manual, 80, 81; G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881.

It is held that though influences may have been used that *per se* would render a confession incompetent, the same may be admitted in evidence if it is shown that the effect of such influences was in fact entirely dispelled before the confession was actually made. See 1 Greenl. Ev. § 221; State *v.* Guild, 5 Halst. 180; People *v.* Jim Ti, 32 Cal. 60; Manual, 81 § 77.

3. 1 Greenl. Ev. § 231; People *v.* Ah Ki, 20 Cal. 177. But where a confession induced by a promise, &c., is shown not to have been false by the fact that property confessed to have been stolen is surrendered or its place of concealment truly disclosed, the confession, or rather the fact which accompanied it or was discovered in consequence of it, is admissible in evidence against the accused. U. S. Hunter, 1 Cranch C. 317; U. S. *v.* Richard, 2 Id. 439; Frederick *v.* State, 3 West Va. 695; People *v.* Ah Ki, *ante*. "Facts discovered in consequence of a confession improperly obtained, and so much of the confession as distinctly relates to those facts, may be proved." Manual, 81.

4. Page 80 § 76. And see Joy on Confessions, 23.

ıothing to do with the apprehension, prosecution, or exami-
ɔn of the prisoner," is not to be regarded as involuntary,
ss there is good reason to believe that the party, through
e groundless expectation of benefit or the reverse, may have
ı influenced into making a statement which is in fact not
:.[1] Though confessions are in the majority of cases made to
:ials holding the party in confinement or arrest, the mere fact
t he is in custody at the time of making the confession does
stamp it as involuntary.[2]

ɜut the confession, though it must have been voluntary, need
:have been *spontaneous*. It will be admissible though induced
the exhortations of a spiritual adviser, by appeals to the ac-
ıed founded upon the claims of justice, the rights of other per-
s whose safety or interests are involved in his declaring the
th, &c., or by any other influence "collateral to the proceed-
s" and not such as to induce a substantial hope of favor or
r of punishment.[3] So it will be admissible though elicited by
stions addressed directly to the accused by a person in au-
rity and assuming his guilt, or by means of making him par-
ly intoxicated,[4] or by practising upon him some deception by
ich he is entrapped into confessing.[5]

n *military* cases, in view of the authority and influence of
erior rank, confessions made by inferiors, especially when
ɔrant or inexperienced and held in confinement or close arrest,
uld be regarded as incompetent unless very clearly shown not
ıave been unduly influenced. Statements, by way of confes-
ı, made by an inferior under charges to a commanding officer,
ge advocate, or other superior whom the accused could rea-

See 1 Greenl. Ev. § 223.

Wharton, Cr. Ev. § 672; Wiley *v.* State, 3 Cold. 362; Com. *v.* lon, 3 Brewst. 461.

1 Greenl. Ev. § 229; Manual, 80 § 76; Frank *v.* State, 39 Miss. 705.

1 Greenl. Ev. § 229; Wharton, Cr. Ev. § 676; Manual, 81 § 79; le *v.* Ramirez, 56 Cal. 533. But the confession of a person who is much intoxicated to be responsible for his statements is not compe- evidence. See G. O. 234, Fifth Mil. Dist., 1869.

"Provided there is no reason to suppose that the inducement held ras calculated to produce any untrue confession, which is the main to be considered." 1 Greenl. Ev. § 229. And see Manual, 81 also, as very full on this general branch of the subject of justifiable ements, &c., Wharton, Cr. Ev. § 647, 648, 654, 655, 657, 659, 660, 70, 675, 676.

sonably believe capable of making good his words, upon even a slight assurance of relief or benefit by such superior, should not in general be admitted. Thus in a recent case where a confession was made to his captain by a soldier upon being told by the former that "matters would be easier for him," or "as easy as possible," if he confessed, such confession was held not to have been voluntary and therefore improperly admitted.[1] And it has been similarly ruled in cases of confessions made by soldiers upon assurances held out, or intimidation resorted to, by non-commissioned officers.[2]

These principles are equally applicable to a *written* as to a verbal confession. But it is to be remarked that where, (as is often the case when it has been drawn up by another person,) a written confession specifies that the statement is freely made, without hope of favor or advantage, or fear of injurious consequence, (or in words to that effect,) the inquiry as to whether it was *in fact* voluntary is in no manner precluded.[3] But a confession, written or verbal, may always be *confirmed* by evidence going to establish its truth and to prove that it has not been fabricated.[4]

Confessions of Accomplices. Applying here the general principle attaching to conspiracies and concerted crimes, it may be remarked that, a conspiracy or combination having once been proved, a confession by one conspirator or accomplice, provided it relate to the matter of the intended or pending criminal transaction, and be made before the purpose of the association has been accomplished, is admissible in evidence against any other conspirator or accomplice.[5]

Confessions to be Received with Caution. In view of the peculiar conditions of mind and body under which accused per-

1. G. C. M. O. 16, Div. of the Pacific & Dept. of Cal., 1881.

2. G. C. M. O. 3 of 1876; G. O. 54, Dept. of Dakota, 1867. And see instance reported in DIGEST, 258.

3. In a case in G. O. 11, Army of the Potomac, 1864, the proceedings were disapproved because the court would not allow the accused to show that he had signed a written confession without knowing its contents and upon false representations made to him as to the same.

4. See 1 Greenl. Ev. § 231. So a confession may be contradicted, as to any part of it, by evidence offered by the prosecution. G. O. 7, Dept. of the Platte, 1871.

5. See 1 Greenl. Ev. § 233; U. S. *v.* White, 5 Cranch C. 39. note also citation from State *v.* Weesel, 30 La. An. 919, *ante.*

s are often placed when making confessions, of the liability mistake on the part of the witnesses who repeat them when l, and of the tendency of these latter to exaggerate through a l for conviction, evidence of confessions, unless corroborated by ıer reliable evidence, is in general to be received with caution. here, however, a confession is explicit and deliberate as well voluntary, and, if oral, is proved by a witness or witnesses by ıom it has not been misunderstood and is not misrepresented, is indeed one of the strongest forms of proof known to the law.[1]

IV. Evidence Excluded from Considerations of Public Policy.

State Papers, Public Documents, &c. Under this head to be noted—first—confidential archives and "secrets of state," rtaining to the administration of the government, the disclose of which would be prejudicial to the public interest.[2] Thus e archives of the executive departments at Washington, includg such papers and documents as official communications and rrespondence between the President or members of the Cabinet d public officials and agents, civil or military, reports of invesgations and other official communications made, in the line of ty, by officers of the army or navy to their military or naval periors, records of advisory boards, courts of inquiry,[3] &c.,— e esteemed of so *privileged* a character that heads of departents or others in whose legal custody they are,[4] cannot in gen-

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1. 1 Greenl. Ev. § 214, 215; U. S. *v.* Nott, 1 McLean, 499; State *v.* ng, 1 Hayw. 524; Lehman *v.* McQueen, 65 Ala. 570; Whiteside *v.* ıte, 4 Cold. 175; G. C. M. O. 3 of 1876; G. O. 48, Dept. of the ıtte, 1871; Do. 46, Div. of the Atlantic, 1874; Digest, 258.

2. 1 Greenl. Ev. § 250; Digest, 349–350.

3. In Home *v.* Bentinck, 2 Brod. & Bing., in holding that the record a certain military court of inquiry had been properly rejected as evidence upon objection raised at the trial, the court say, (p. 163,)—"On broad rule of public policy and convenience, these matters, secret in ir natures, and involving delicate enquiry and the names of persons, nd protected." In our law, "the proceedings of a court of inquiry y be admitted as evidence by a court-martial," in cases and under circumstances specified in the 121st Article of war. As to the adsion in evidence of records of courts-martial, see *post*, under "Writ-Testimony."

4. As to the routine papers and *quasi* permanent records of the War ıartment, not in general claimed to be privileged, and of which copies ıse in evidence are ordinarily freely furnished, see Digest, 349–350.

eral be required to furnish the same, (or copies,) to be produ in court, if it be determined by them not to be for the pul interest that their contents should be disclosed; nor, if furnis will the courts in general admit them if objected to.[1] The co appear to have recognized an exception to this rule only in a of an official communication proved to have been made n ciously and without due cause.[2]

Names, &c., of Persons employed in Criminal Inve gations. A like consideration—that it is important to the in ests of the community in connection with the due administra of penal justice, as well as to the protection of the persons th selves, that public agents or others employed in the investiga of crime should not be known—excludes testimony which w make public the names of such persons, or their operations or information on which they have proceeded, except in so fa strict justice to the accused may render necessary.[3]

On a similar principle, a military officer, directed by an auth ized superior to investigate a case of supposed dereliction make report, cannot properly be required as a witness befor court-martial, to disclose either the contents of his report, or names of the persons examined by him or their statements.

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1. Home *v.* Ld. Bentinck, 2 Brod. & Bing. 130; Beatson *v.* Ske 5 Hurl. & Nor. 837; Dawkins *v.* Ld. Paulet, 5 Q. B. 94; Dawkins Rokeby, 8 Id. 255; Dickson *v.* Earl of Wilton, 1 Fost. & Fin. 4 Gardner *v.* Anderson, 22 Int. Rev. Rec. 41; Maurice *v.* Worden, Md. 233; XI Opins. At. Gen. 142; XV Id. 378, 415; Wharton, Ev. § 513; 1 Greenl. Ev. § 251; Manual, 84, § 94. Where the custod declines to produce the paper on grounds of public policy, *second* evidence of its contents will not be received by the court. Maurice Worden, 54 Md. 233.

2. See Maurice *v.* Worden, 54 Md. 233. This was an action for li based upon an official endorsement made by the defendant as Superi tendent of the Naval Academy, in forwarding the resignation of t plaintiff, as an assistant professor, to the Secretary of the Navy. A co of the endorsement, furnished to the plaintiff by the Navy Departme being offered in evidence, was objected to by the defendant on the grou that the writing was a privileged communication. The Court held it " be privileged to the extent that the occasion of making it rebuts the p sumption of malice, and throws upon the plaintiff the *onus* of prov that it was not made from duty, but from actual malice and with reasonable and probable cause."

3. 1 Greenl. Ev. § 250; Rex *v.* Hardy, 24 How. S. T. 753; Rex Watson, 2 Stark. 119; U. S. *v.* Moses, 4 Wash. C. 726; Manual, 85 §

Professional Communications. Under the present head is also properly considered evidence of professional communications, that is to say declarations and statements, verbal or written, made to a legal adviser. These are protected from disclosure on public grounds, and cannot be admitted in evidence if excepted to by the accused party by whom they were made.[1] Thus if an accused, in the course of his communications to his counsel, shall have disclosed the commission of, or participation in, by him, of the criminal offence with which he is charged, the counsel cannot be interrogated or required to testify as to the same against the objection of the accused. So, a counsel, against such objection, cannot be obliged to produce or disclose the contents of papers committed to him in his official capacity by the accused.[2]

It is to be remarked that the privilege of objecting to the disclosure in evidence by counsel of communications made to him professionally is *personal to the client* and for his benefit, and that the objection may be *waived* by him.[3]

The rule under consideration is laid down by the authorities with reference of course to *civilian* legal advisers. But, in principle, it is equally applicable to the relations between the accused and *military* persons acting as their counsel on military trials, where professional counsel is often not attainable and resort is

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1. In the absence of such protection, "the course of justice must stop. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights." * * * Without such privilege, "no person can safely come into a court either to obtain redress or to defend himself." Lord Ch. Brougham, in Bolton *v.* Corp. of Liverpool, 1 My. & K. 94, 95. And see Bk. of Utica *v.* Mersereau, 3 Barb. Ch. 528; Cheirac *v.* Reinicker, 11 Wheaton, 280; Aiken *v.* Kilburne, 27 Maine, 252; IV Opins. At. Gen., 383; 1 Greenl. Ev. § 237–246. "But this protection does not extend to any such communications if made in furtherance of any *criminal* purpose." Manual, 85 § 99.

2. But he may be examined as to the fact of the existence of such papers, in order to let in secondary evidence as to their contents. So he may be called upon to prove the identity of his client, or his handwriting. 1 Greenl. Ev. § 245; IV Opins. At. Gen., 384.

3. It is an implied waiver of the privilege for the party to examine his own attorney, as a witness, in regard to communications professionally made to him by the party, and where he does so, the witness is bound to answer generally, on cross-examination. Crittenden *v.* Strother, 2 Branch C. 464.

That the counsel may be willing to be examined does not affect the privilege of the client to object. Aiken *v.* Kilburne, 27 Maine, 252.

religious creeds and the freedom of religious belief recognized in this country and impliedly sanctioned by the Constitution, the objection to a mature person offered as a witness, that he was insensible to the obligation of an oath, would have to be made clearly established to be accepted as excluding him from the stand on a military trial.[1] In the case of a very young child a less degree of proof would be called for, though here the proper objection would be that of deficiency of intelligence rather than of religious sense.[2]

It is to be noted that the exception under consideration, where it exists in any degree to a witness, may in general be avoided by his making *an affirmation in lieu of an oath*[3]—as all witnesses are authorized to do by our law.[4]

Infamy. At the common law, "infamy," or the status of having been convicted of an "infamous" crime, renders a person incompetent as a witness. The term infamous crime comprehended "treason, felony, and the *crimen falsi;*" the latter term having reference to such offences as perjury, forgery and conspiracy and to certain frauds. An objection on the ground of infamy can be sustained only by the production of the record of conviction and judgment; proof merely that the party has been subjected

1. The weight of authority seems to be in favor of the view that the objection must be sustained by the testimony of persons other than the witness—persons who have heard his declarations, &c.; and that the witness himself cannot be personally questioned as to his religious opinions. 1 Greenl. Ev. § 370 and note; Wharton, Cr. Ev. § 358, 362.

On Gen. Swaim's Trial, a witness, objected to as incompetent for want of religious belief, stated that he neither believed nor disbelieved in the existence of a Supreme Being—was an "Agnostic." No other testimony was offered. The Court sustained the objection.

In a case in G. O. 10, Dept. of the Columbia, 1871, in which an Indian witness was rejected as incompetent because insensible to the sanctity of an oath, the proceeding was disapproved for the reason that no *proof* of such insensibility appeared to have been offered.

2. See *post.*

3. Wharton, Cr. Ev. § 361.

4. "A requirement of an 'oath' shall be deemed complied with by making affirmation in judicial form." Rev. Sts., Sec. 1. And see Article 92.

"Persons who entertain conscientious scruples against the form of a judicial oath are allowed, when summoned as witnesses, to use the form —'I solemnly and truly declare and affirm,' or words to like effect, but without importing any relaxation of the punishment of perjury if they give false testimony." Abbott's Law Dictionary—Affirm.

hment is not sufficient.[1] It is apparently held by of authority that a record of a "*foreign*" judg- judgment of a court of a different State—will not objection.[2] Whether, therefore, a conviction of a y civil court—or any such court other than a court ed States—could be accepted as establishing such fore a court-martial is certainly doubtful. At mil- the absence of any statute attaching such a disability, an officer or soldier has been convicted of desertion itary offence can affect in no manner his competency before a court-martial.[3] A military case to which -law rule would appear most aptly to apply would officer or soldier convicted by a court-martial, in of one of the higher crimes specified in Art. 58.

y of Understanding. The persons held incom- is cause are chiefly idiots, insane persons, persons in toxication and very young children. In the words al[4]—"A witness is incompetent if, in the opinion , he is prevented by extreme youth, disease affecting any other cause of the same kind, from recollecting on which he is to testify, from understanding the t to him, from giving rational answers to those ques- n knowing that he ought to speak the truth." That *deaf and dumb* does not render him incompetent, has average intelligence and can communicate what ther in writing or by signs through an interpreter. ere is something in the appearance of the witness nes to the stand clearly indicating that he has not the requisite intelligence, the *onus* of showing that etent from want of understanding will be upon the

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1. Ev. § 372, 375.

. Ev. § 376; Wharton, Cr. Ev. § 363, note.

, Dept. of the Platte, 1867; Do. 2, Dept. of Dakota, 1875; 03, Dept. of the East, 1870; Do. 44, Dept. of the Colum- . 45, Dept. of Cal., 1883.

not rendered incompetent to testify as a witness before a by the fact that he is an enemy in arms. See DIGEST, of the confederate army were admitted to testify upon military commission, of the Assassins of President Lincoln, Henry Wirz, in 1865, while the *status belli* was still pending. § 86.

party objecting. The court also, especially in the case of chi dren, may itself properly interrogate the witness, with a view t more fully satisfying itself as to his competency.[1]

The law has fixed no age at which a *child* may be presumed t have the requisite understanding to qualify it to be a witne the competency of children depends more upon intellige than age.

As to *insane* persons, the fact that they are subject to fits derangement does not affect their competency provided they sane at the time of being called upon to testify.[2] So a per insane upon some particular subject or subjects will not be inco petent as a witness if his delusions do not materially impair general intelligence.[3]

Intoxication should in general render a person only tempora incompetent as a witness. "Witnesses put aside when dru may be examined when sober."[4]

Wives of Accused Persons. The familiar general rule the law of evidence that neither the husband nor the wife is co petent as a witness either for or against the other, though parted from in some of the States, is strictly held in the crimi courts of the United States and in courts-martial.[5] And application of the principle extends "to all cases in which t interests of the other party are involved."[6] Thus the testimo of the wife of an accused will not be admissible for or against party jointly charged with him where her testimony will be m terial to the merits of the question of the guilt or innocence her husband.[7]

The general rule, however, is subject to exception in ca

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1. See 1 Greenl. Ev. § 367.

2. Evans *v.* Hettich, 7 Wheaton, 470; 1 Greenl. Ev. § 365; Simmo § 921.

3. Regina *v.* Hill, 5 Eng. L. & E. 547.

4. Simmons § 921.

5. See the reasons for this rule as set forth by McLean, J., in Stein Bowman, 13 Peters, 223; also in 1 Greenl. Ev. § 254, 334, 337. T statute of 1878 authorizing accused persons to testify, (see *post*,) do not affect the application of the rule. See DIGEST, 482.

6. 1 Greenl. Ev. § 335.

7. 1 Greenl. Ev. § 335, 407; Simmons § 925; Territory *v.* Paul, Mont. 314.

where the trial is for bodily injury or violence inflicted by the sband on the wife or *vice versa.*"[1]

Thus, in a military case, a wife would in general properly be held mpetent to testify against her husband when charged with a olation of the 61st or 62d Article of war in maltreating her ıder circumstances rendering his act a military offence.[2]

Accused Persons Themselves. By the Act of Congress of arch 16, 1878, c. 37, it is provided that upon criminal trials and oceedings before not only "United States courts" and "Territrial courts," but also "courts-martial and courts of inquiry," e accused "*shall, at his own request but not otherwise, be a competent witness.*"[3] An accused person thus may, at his option, take ıe stand as a witness, but in so doing he occupies no exceptional atus,[4] and, (as will be more particularly noticed hereafter,) bemes subject to cross-examination like any other witness.

Co-accused and Accomplices. Except when testifying at is own request under the Act of 1878, above cited, a defendant ı a criminal case is not regularly competent as a witness for or ainst a *co-defendant* unless he has been discharged from the cord,—as by the entry of a *nolle prosequi*,—or unless, having en accorded a separate trial, (a proceeding of rare occurrence the military practice,) he has been duly acquitted or convicted. military cases where the prosecution proposes to call upon a accused as a witness, the entry of a *nolle prosequi*, though the ore usual course, is not invariable: where this course is not ırsued, and the witness has testified in good faith on the trial, is in general announced in the Order in which the proceedings the case are passed upon that he is released from arrest and rther proceedings against him are discontinued.[5]

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1. Manual, 82 § 85.
2. See cases in G. C. M. O. 17 of 1871; G. O. 1, Dept. of Miss., 1866.
3. "And"—it is added—"his failure to make such request shall not ate any presumption against him."
The words "at his own request but not otherwise" indicate the disction between our law and that of Europe where, at courts-martial, inquisitorial form of examination is pursued as to the accused.
. McKeone *v.* People, 6 Col. 346; G. C. M. O. 179, Dept. of Da-a, 1882.
. See instances in G. O. 13, Dept. of the South, 1866; Do. 30, Dept. al., 1865.

But the mere fact that a person was an *accomplice* of the cused does not so identify him with the latter as to render l incompetent to testify for or against him. Nor is his com tency affected by the fact that he has himself been charg separately—with the same offence. The objection is not to competency but to his *credibility*—as will be noticed under other head.[1]

Other Persons. Neither a member of a court-martial judge advocate, nor the officer who is to review and pass the proceedings, is incompetent to testify before the court. is not desirable however that any of these officials should ap as witnesses, except perhaps to give evidence as to the mil character or record of the accused. As has been remarked previous Chapter,[3] a resort to a *member* as a witness on the n is especially to be avoided.[4]

III. The Examination of Witnesses.

This subject will be considered under the heads of:—1. I Examination; 2. Cross-Examination; 3. Re-examination, 4. The privilege of the witness as to not answering crimina &c., questions; 5. Impeaching testimony; 6. Testimony character.

1. *Direct Examination.*

This, which is also called the "Examination-in-chief," i original examination, by the party producing them, of the nesses by whose testimony he seeks to maintain his side o case. It refers mainly to that examination by which, (subje cross-examination by the adverse party,) the prosecution o fence is opened and displayed. It embraces also, howeve examination of witnesses offered *in rebuttal* of direct testi from the other side,—as where witnesses are introduced to new matter brought out in the defence, or to show that imp ing testimony is itself unworthy of credit.

[illegible] and Weight of Oral Testimony," *post.*

[illegible]

[illegible] that persons of alien races, including *In* [illegible] white persons, natives, [illegible] States. See G. C. M. O. 54. I [illegible] Sec. 1977 Rev. Sts.

Premising that the direct examination of every witness prop-
y begins in general with asking his name, and, in military
es, his office, rank, corps, regiment, &c., and whether he
ows or identifies the accused,—we proceed to notice certain
neral principles which, though *in part* applicable to all stages
the examination of a witness, are best illustrated as governing
Examination-in-chief—as follows:

The Examination should consist of Questions relevant the Issue. This rule, the application of which is one of the
tures which distinguish the direct from the cross examina-
n, has been specifically considered under an earlier title.[1]

**All the Testimony is to be viva voce, and to consist of
ts derived from the Personal Knowledge and Mem-
of the Witness.** This principle is indeed one of general
lication, but is here noticed because of two apparent qualifi-
ons which affect its operation in the course especially of the
ct examination.

Memorandum to refresh memory. Thus, the general rule
ompatible with allowing a witness to "refresh and assist" his
mory by a reference to some *writing*, which may be either an
cial document or other written instrument, (original or copy,)
ormal entry in a book, or any mere note or memorandum,
ten or in print. Where the writing consists of a memoran-
n or paper made by the witness himself, it should appear, from
testimony, to have been made at the time of the fact or trans-
on to which it refers, or so soon after as to afford the presump-
that the memory of the witness as to such fact, &c., was
h in making it. Where the paper is not one made by the
ness, it must appear that, on inspecting it, he can speak to
facts from his own recollection; otherwise he cannot be per-
ed to make use of it. Nor indeed can he use it in any case,
y whomever made, unless it enables or assists him to testify
f his own memory or knowledge. If, instead of serving as a
sher of memory, it is relied upon to supply facts not other-
known to the witness, it is of course not a legitimate means
eference.[2] It is usual and desirable, (though not essential,)

See "Admissibility of Evidence," *ante*.

U. S. *v.* Wood, 3 Washington, 440; Patriotic Bk. *v.* Frye, 2

that the writing be brought into court and produced by (c hibited to) the witness upon the stand, since thus its natur effect can be fully made to appear on the direct or cross e nation.[1]

Statement of opinion or belief. The general rule, i quiring the witness to state facts within his personal knowl does not require that he should speak with entire certaint only to the best of his recollection. If his testimony, tl not of an assured character, be based upon *some* memory (facts, it will be admissible for what it is worth. But the (*except* as presently to be noted,) *does* exclude all matters r in the individual *opinion* of the witness. His opinion upc merits of the issue, or as to the motives, intention, or cond others, or the effect of their acts, or as to what would have his own conduct in a particular case, or upon any general tion of moral or legal obligation, is wholly inadmissibl should be ruled out on objection made.[2]

Cranch C. 684; State *v.* Rawls, 2 Nott & McC. 331; Elston *v.* I cott, 46 Ills. 187; Hill *v.* State, 17 Wisc. 675; 1 Greenl. Ev. § 43 Manual, 86. It is not sufficient for the witness to swear that he n memorandum which he believes to be true, and that he relies u without any present recollection of the facts. Lawrence *v.* Ba Wend. 305. The privilege of using a paper as a memorandum to r the memory, does not authorize the witness to read his evidence notes previously prepared. Maltby, 44–5. It has been held that ness may make use, as a refresher, of a *copy* of an original memora provided it satisfactorily appears that the copy is a true one. Ch &c., R. R. Co. *v.* Adler, 56 Ills. 344. In a case in G. C. M. O. 22, of the East, 1882, it was held that a guard book, containing an e a charge of absence-without-leave against a soldier, not being ev of the commission of the offence, could be used as a memorand refresh the memory of a witness as to the occurrence.

1 1 Greenl. Ev. § 437, and notes.

2 See 1 Greenl. Ev. § 441; DIGEST, 255; Manual, 86. Wit are not to testify as to their *opinion* or what they *think*, but wha know or have *seen*. G. C. M. O. 64, Dept. of the East, 1872. ions of witnesses who are not experts, are not admissible. G. C 1843; Do. 32, Dept. of the East, 1869; G. C. M. O. 121, Id., G. O. 42, Dept. of the Platte, 1871; G. C. M. O. 17, Dept. of 1873. Opinions of officers on points upon which the *court* is the judge are inadmissible. G. C. M. O. 41, Dept. of the East, 1872; Wilkes' Trial, pp. 30, 85, 94. A witness cannot be asked his c of the prisoner's guilt. G. C. M. O. 21, Dept. of the East, 1871 whether he thinks that the accused intended to desert, this being tion for the court. G. C. M. O. 75, Dept. of the East, 1871.

r a witness, however, to declare the existence or occurrence act which is a matter of *common observation*, and in general ble and scarcely mistakable—as the fact of *drunkenness*, or the accused or other person *was drunk* on a certain occasion—t properly a statement of an *opinion* but of a fact so far within ersonal knowledge of the witness as to render it admissible idence.[1]

xceptions—Facts at issue resting on belief. There are noticed two excepted classes of cases, however, in which esses are allowed to declare their opinion or belief. The is where a certain matter of fact resting wholly on belief is tly in issue, as the fact, for example, of the *identity* of a n. So of the fact that a writing is or not in the *handwrit-* f a party: here a witness familiar with the handwriting may ked and may state his belief as to the fact in issue, without ; an expert.[2]

inions of experts. The second class is the familiar one ses involving questions of science or questions requiring for solution a peculiar skill or knowledge of a specialty, in h is admitted the testimony of *experts*.[3] Thus, in the mili-

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People *v.* Eastwood, 14 N. Y. 562; Stacy *v.* Portland Pub. Co., aine, 279; Sydleman *v.* Beckwith, 43 Conn. 12; State *v.* Huxford, wa, 16; G. O. 42, Dept. of the Platte, 1871. As to drunkenness, iews of officers and non-commissioned officers are in general more ble than those of private soldiers. G. O. 27, Dept. of the Arkan- 1866. But the witness could not properly be asked whether the sed was so drunk as to be incapable of forming a criminal intent. or *v.* State, 63 Ala. 173.

Opinions of witnesses derived from observation are admissible when, the nature of the subject under investigation, no better evidence be obtained." Brown *v.* Com., 14 Bush, 405. And see Hardy *v.* rill, 56 N. H. 232. In Ins. Co. *v.* Lathrop, 111 U. S., 612, it is that a non-expert may give his opinion as to the *sanity* of another on, in connection with a statement of the facts and circumstances in his knowledge upon which such opinion is based.

As to proof of Handwriting by experts, &c., see "Private Writ- " *post.*

See 1 Greenl. Ev. § 440. The qualifications of the expert to give nce, as such, may be tested not only by interrogating the witness lf as to his experience, but also, (though this means is not often re- l to,) by the testimony of other witnesses. Tullis *v.* Kidd, 12 Ala. And not only should the character of experts, as such, be "satis- ily established," but their testimony, to be reliable, "must be free suspicion of interest, bias, or prejudice." Schultz *v.* U. S., 2 Ct. of

tary practice as in the civil, medical men, whether or not officers of the army, are frequently and properly called to testify as to the cause of death or disease, the effect of wounds or injuries, or the question of the sanity of an accused person, witness, &c. Such experts, in expressing their opinions, need not found them upon any personal observation;[1] it is sufficient if they are based upon the facts of the case as narrated by other witnesses whose testimony they have listened to, or, where they have not heard the facts detailed in evidence, upon a statement of similar facts presented hypothetically by the examining party or counsel.[2] B

Cl. 380. In Johnson *v.* Root, 1 Fisher, 361, Sprague J. charges the jury to consider, in weighing the testimony of an expert, "his ability, his knowledge of the art or profession in which he is engaged, the firmness with which he expresses an opinion, the impartiality of that opinion, and all those considerations which go to create a confidence or a distrust of the opinion which is given. You will," he adds, "take into consideration also the reasons that may be assigned by the experts for their opinions." In Tullis *v.* Kidd, it was held, in regard to a medical expert that it was not necessary that he should be in the practice of his profession, if it appeared that he had studied it as a science, and "felt confident to express a medical opinion upon a particular disease;" the fact that he was not at the time a practising physician going to his credibility only. But of course the weight and value of the testimony will depend mainly upon the amount of the practical experience of the witness. See Allen *v.* Hunter, 6 McLean, 303.

"Officers of the army, *as such*, are not to be treated as experts before a military court." G. C. M. O. 41, Dept. of the East, 1872. In D. 113, Id., 1871, the action of a court-martial in calling upon the Judge Advocate of the Department to testify as an expert upon a question of law raised in the case—whether a member absent at the organization could subsequently come in, qualify and act—was properly disapproved by the Dept. Commander.

1. See 3 Greenl. Ev. § 5.

2. The following appear to be approved forms of interrogating the expert in this class of cases: 1. *Where the expert has heard all the testimony in regard to the actions, indications, &c., of the accused, (or witness,) alleged to have been insane.* Here he may properly be asked—'Supposing the testimony which you have heard to be true, is it your opinion thereon that such person is, (or was, at the time of the offence,) insane?' It may be also asked—'What state of mind do such symptoms, &c., indicate?'—or 'What would, in the belief of the witness, be the conduct of such a person in certain supposed circumstances.' (See Com. *v.* Rogers, 7 Met. 506.) 2. *Where the expert has not heard the testimony or has heard it only in part.* Here it is the practice for the examining party or counsel to state to the witness the substance of the testimony, and then to ask, whether, *supposing such testimony to be true*, the person in question was, (or is,) not, in the opinion of the witness, insane, &c., as above. The hypothetical question must be based upon

pert cannot state his opinion "as to the general merits of use," but only his opinion "upon the facts proved;" nor : state it as to any *other* question in the case not involving knowledge for its solution.[1]

Party may not Impeach the Credibility of his own ess. This is also a general rule peculiar to the direct ex- tion. A party, in offering a witness, is presumed to be ac- :ed with his character and is viewed as representing him itled to credit. He is therefore in general bound by the ients of the witness, and if his statements prove contrary it was expected, the party will not be permitted to impugn :dibility, either directly by attacking his general reputation racity, or indirectly by "general evidence tending to show nworthy of belief."[2] The party is not indeed precluded putting in *other* testimony, as to a particular fact, which is y contradictory to the testimony of such witness;[3] but ther testimony cannot properly be introduced in the form ersonal reflection upon the witness. Where, however, a has been innocently misled by the witness whose statement : stand turns out to be materially different from the one usly made, and which induced the party to introduce him, weight of authority," says Greenleaf, "seems in favor of ting the party to show, that the evidence has taken him by se, and is contrary to the examination of the witness pre- ry to the trial, or to what the party had reason to believe he testify; or, that the witness has recently been brought

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is evidence in the case tending to prove the matters stated in the n. Bomgardner *v.* Andrews, 55 Iowa, 638.

ee 1 Greenl. Ev. § 440; U. S. *v.* McGlue, 1 Curtis, 1. "Even the medical or other professional witnesses have attended the trial and heard the testimony of the other witnesses as to the facts :cumstances of the case, they are not to judge of the credit of itnesses or of the truth of the facts testified by them. Com. *v.* s, 7 Met. 505.

reenl. Ev. § 442; Lawrence *v.* Baker, 5 Wend. 305; Cooker *v.* olacca, 7 Philad. 199. In G. O. 4 of 1843, where the accused was l by the court to call a witness to contradict a previous witness ced by him, and show that the latter had made a different state- om that given in his testimony, the proceedings were in this re- isapproved by the Secretary of War.

Greenl. Ev. § 443; U. S. *v.* Watkins, 3 Cranch C. 442; Law- . Baker, 5 Wend. 305; Clapp *v.* Peck, 55 Iowa, 270.

under the influence of the other party, and has deceived the party calling him."[1]

Leading Questions are Not to be Asked. It is a further general rule governing the *direct* as distinguished from the *cross* examination,[2] that a "leading" form of questioning a witness may not be pursued in regard to the material facts at issue in the case on trial.[3] The 90th Article of war recognizes this rule in making it the duty of the judge advocates to "object to any leading questions to any of the witnesses," as a measure of protection to the accused. Leading questions may be said to consist mainly of three sorts, closely connected however in their nature, as follows:—1. Those "which suggest to the witness the answer desired;" 2. Those "which, embodying a material fact, admit of an answer by a simple negative or affirmative;" 3. Those which, in their form, "assume facts to have been proved which have not been proved," or assume "that particular answers have been given which have not been given."[4] The proper and legitimate province of direct examination is to elicit the precise matters of fact within the knowledge or recollection of the witness and no more, and to induce him to communicate them naturally and in his own language without either prompting or restraint. Any direction, therefore, given to his thoughts, on the part of the interrogator; any suggestion as to the form of

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1. 1 Greenl. Ev. § 444. That a party may discredit his witness when he has been entrapped, see McDaniel *v.* State, 53 Ga. 253.

2. "To allow leading questions is to give a direct the character of a cross examination." People *v.* Mather, 4 Wend. 247. As to the use of leading questions on the cross-examination, see *post.*

3. The rule does not apply to questions put in regard to *preliminary* matter, not tending to prove or disprove the issue. Gannon *v.* Stevens, 13 Kans. 447; 1 Greenl. Ev. § 434. "It would be mere waste of time to enforce the rule where the questions asked are simply *introductory*, and form no part of the real substance of the inquiry, or where they relate to matters which, though material, are not disputed. But where a question relates to a contested point, which is either directly conclusive of the matter in issue, or directly and proximately connected with it, the rule should nearly always be strictly enforced." Manual, 87 § 106.

4. 1 Greenl. Ev. § 434; Manual, 87 § 106. "It is a mistake to suppose that such only is a leading question to which *yes* or *no* would be a conclusive answer. A question is also leading which puts into a witness mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him." Marcy J., in People *v.* Mather, 4 Wend. 247.

nce of his answer; any repression of a full statement of he has to say that is material; any deceit or disingenuous- oncealed in the question that may tend to shape the reply witness, divert it from its intended form, or, in short, pre- or embarrass a true and honest response,—these and all sim- nfluences and expedients are, as a general rule, irregular nauthorized.[1]

ceptions. There are recognized, however, certain excepted in which leading questions may not only be proper but sary for the eliciting of the truth. As where the witness is festly *hostile* to the party by whom he has been called, or is *interest* of the opposite party, or exhibits, for some cause, ided *unwillingness or reluctance* to testify, or a disposition evaricate, or is stupid, or is very young.[2] A further excep- s where the testimony of the witness is defective in that he t recollect or specify a certain material fact: here it may be itted to mention or suggest the particular matter in regard ich an answer is desired.[3] But in such a case the most ved course is first to exhaust the recollection of the witness ting him what was said or done, &c., in general. If, when s made his statement in answer, some material circumstance itted, the best practice is to ask him if he has stated all that members, and, upon his replying that he has, to then call ttention, by specifying it, to the particular fact, thing, or age, and inquire if it existed, was done, said, &c. Among ore familiar occasions for pursuing this course are those a name, a date, or an item such as an article of property— ps one out of many—has been forgotten; or where disre- ul or other material words spoken, the phraseology of a ver- der, &c., cannot be recalled or accurately testified to without so specified.

scretion of the court as to the admission of leading ions—Military cases. Whether, in any civil case, the

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'If it were not for this rule, a favorable and dishonest witness be made to give any evidence that is desired.'' Manual, 87 § 106.

Greenl. Ev. § 435; People *v.* Mather, *ante;* Moody *v.* Rowell, k. 498; Coon *v.* People, 99 Ills. 368; G. C. M. O. 18 of 1874— s of Gen. Terry; Do. 14 of 1864; G. O. 36, Dept. of La., 1869; l, 88–9.

Greenl. Ev. § 435; Manual, 88; People *v.* Mather, *ante;* Moody ell, *ante.*

circumstances presented constitute so far an *exception* to the general rule as properly to allow leading questions to be put on the direct examination of a witness, is a matter which rests entirely in the *discretion* of the court, and not one which can be "assigned for error."[1] So, in a *military* case, the improper admission of a leading question or questions would not affect the legal validity of the proceedings, though, in an extreme instance, it might well induce a disapproval of the same.[2]

A special form of leading interrogation, sometimes pursued in military cases but irregular and improper, may here be noticed. This consists in reading the charge and specification, or stating their substance, to the witness, and then asking him what he knows on the subject. This form is objectionable in that it leads the witness as to the details of the offence as charged, and suggests them to him as a given basis for his testimony, instead of leaving the same to rest solely on his personal knowledge and recollection. It has been repeatedly condemned by the authorities and in Orders.[3]

2. *Cross-Examination.*

Its Scope in general. The direct examination of a witness being concluded, the opposite party, though he may waive it, proceeds ordinarily to avail himself of the right of cross-examination. The exercise of this right, as a test of the perception,

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1. 1 Greenl. Ev. § 435; Moody *v.* Rowell, *ante;* Donnell *v.* Jones, 13 Ala. 490; Shufflin *v.* People, 4 Hun. 16; King *v.* Mittalberger, 50 Mo. 182.

2. In G. O. 36, Fifth Mil. Dist., 1868, it is remarked by the reviewing officer, (Gen. Neill,) in regard to the action of the court in admitting questions of this character, as follows:—"There appears to have been no limit to the number of leading questions improperly allowed. Thus arbitrarily to set aside the rules of evidence is unprecedented and illegal. A Court possesses no power to authorize the examination of a witness to be conducted in any other manner than that sanctioned by the well established rules of law. The proceedings are disapproved." And see G. O. 71, Dept. of Dakota, 1870.

3. See McNaghten, 185; Bombay R., 28; Gilchrist, 20; G. O. 12, Dept. of the Mo. 1862; Do. 36, Id., 1863; Do. 77, Dept. of the East, 1870; Do. 29, Dept. of Cal., 1865; G. C. M. O. 54, 120, Div. of the Pacific & Dept. of Cal., 1880; DIGEST, 255. A still more objectionable form is to recite the charge in terms or substance, and ask the witness directly whether the accused actually committed the specific act alleged. As—'Did he desert?' 'Did he sell or through neglect lose his clothing, &c.?' See G. O. 67, Dept. of the South, 1874; DIGEST, 255.

ervation, recollection and veracity of the witness,—always portant to the due investigation of truth and administration justice,—has become even more so than formerly; certain sses of persons who once were excluded from the stand—inding the accused himself[1]—being now admitted, and facts ich once went to the competency now going to the credibility the witness. In view of its purpose and significance, a much eater latitude is properly allowed in the cross-examination than the direct;[2] leading questions, for example, being freely peritted;[3] and matters otherwise irrelevant and collateral being lowed to be gone into to a reasonable extent, (and subject to e limitations yet to be noticed,) where properly apposite to the sting of the knowledge, memory, or *animus* of the witness, or discrediting him in general.[4]

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1. That an accused person, on taking the stand, subjects himself to oss-examination in the same manner and to the same extent as any ther witness,—see DIGEST, 258, 482; G. O. 8, 16, Dept. of the Platte, 79; Do. 6, Id., 1880; G. C. M. O. 34, Dept. of Texas, 1879; Do. 13, l., 1882; Do. 179, Dept. of Dakota, 1882; Wheelden *v.* Wilson, 44 laine, 11; Marx *v.* People, 63 Barb. 618; Fralich *v.* People, 65 Id. 48; lark *v.* State, 50 Ind. 514; People *v.* McGungill, 41 Cal. 429; Rea *v.* lissouri, 17 Wallace, 542. In the last case it is said that even a greater titude is allowed in the cross-examination of a *party*.

2. It is however always within the discretion of the court to confine a oss-examination within reasonable limits—to stop it when unreasonably rotracted. Reed *v.* Clark, 47 Cal. 194. Under the license of cross-amination a party cannot be permitted to bully or insult a witness, articularly when he is an official superior to whom he owes deference d respect. See remarks of Gen. Terry in G. C. M. O. 134, Dept. of akota, 1884.

3. The right to employ leading questions on the cross-examination is bject to a possible limitation, in the discretion of the court, "where e witness shows a strong interest or bias in favor of the cross-examing party, and needs only an intimation to say whatever is most favorle to that party." Moody *v.* Rowell, 17 Pick. 498. And see G. C. I. O. 18 of 1874—remarks of Gen. Terry.

4. "Everything which goes to affect the credit of a witness as to the articular facts to which he is called to testify is material and admissible." om. *v.* Hunt, 4 Gray, 423. See the point, that questions as to the otives or *animus* of the witness are permissible on the cross-examinaon, recognized in G. C. M. O. 7 of 1873; Do. 8, Fourth Mil. Dist., 1867; o. 23, Dept. of Texas, 1873; G. O. 11, Dept. of Cal., 1865; Do. 8, Div. the Atlantic, 1875. That the question, whether the witness has not eviously expressed *hostility* toward the accused, is not an irrelevant e on cross-examination, see *post*. In G. C. M. O. 24 of 1872, it was d that a witness, who had testified that the accused was drunk, might asked, to test his powers of perception at the time, whether he was

Upon the liberty, however, of cross-examination there are certain restrictions, as follows:—

1. To be confined to the matter of the direct examination. The rule is established in the U. S. courts,[1] and observed in the military practice,[2] of restricting in general the cross-examination to the subject and scope of the direct examination. Such rule tends to simplify and confine within reasonable limits the investigation of a criminal trial, and is peculiarly adapted to the purposes of a court-martial as an instrument of prompt and efficient justice. In consequence of this rule, if the adverse party wishes to examine the witness as to matters not embraced within the scope of the direct examination, he must, as observed by Judge Story, "do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause."[3] This rule indeed may be allowed to be departed from in the discretion of the court;[4] and it is to be understood that it has reference mainly to facts pertaining to the issue and material to the prosecution or defence, and does not apply to questions outside of the main subject at issue and asked for the purpose of testing the motives, prejudice, or credit of the witness.

2. Not to be extended to collateral matters with a view to contradict the witness—Previous statements and expressions. It is an established rule of the law of evidence, repeatedly recognized in military cases,[5] that a party cannot be

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then himself sober. And see a similar case in G. O. 48, Dept. of the South, 1869, cited *post.*

1. R. R. Co. *v.* Stimpson, 14 Peters, 461; Houghton *v.* Jones, 1 Wallace, 702; Rea *v.* Missouri, 17 Id. 542.

2. Simmons § 604; G. O. 85, Dept. of the Cumberland, 1867; G. C. M. O. 18, Dept. of the Columbia, 1880. But a party has the same right to cross-examine a witness as to matter brought out, on the direct examination, by questions addressed *by the court*, as he has in regard to matter brought out by the opposite party. G. C. M. O. 48, Div. of the Pacific & Dept. of Cal., 1880.

3. R. R. Co. *v.* Stimpson, *ante.* Matters of defence are not in general properly proved by cross-examination. Dennis *v.* Van Voy, 8 Vroom, 38. A party who has not yet opened his own case cannot in general properly do so by a cross-examination of his adversary's witnesses. Thornton *v.* Hook, 36 Cal. 223.

4. See Rea *v.* Missouri, 17 Wallace, 542.

5. Simmons § 975; Lieut. Hyder's Trial, 157; Lieut. Col. Fremont Trial, 256. And see the case of 1st Sgt. Clerc, in G. C. M. O. 45, De

mitted to cross-examine a witness as to any "collateral, independent fact, irrelevant to the main issue," for the purpose of ing a foundation for subsequently contradicting him by other idence and thus discrediting him; but that the answers of the itness to all such collateral interrogation are to be taken as conusive against the cross-examining party.

But a question whether the witness has not at some previous me told a different story, or given a different account of the atter testified to on his direct examination, is not collateral or relevant; nor is a question whether the witness has not preiously expressed hostility toward the accused.[1] And questions f either kind, being relevant, may be asked the witness on cross-xamination, with a view of contradicting him by other evidence, n the event of his returning a negative answer.[2] The form of the ross-examination in such cases will be further referred to under he head of "Impeaching Testimony."

3. *Re-Examination, &c.*

Its Scope. Where the witness, in the course of the cross-xamination to which he has been subjected, has made statements ot in harmony with those made upon the examination in chief, r statements of a doubtful or equivocal character, an occasion s presented for his *re-examination*, (or, as it is sometimes called, "examination in reply,") by the party who originally called him, or the purpose of eliciting from him an *explanation* of such

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f Cal., 1883, in which it is remarked by the reviewing authority, (Gen. chofield,) as follows:—"The defence was permitted to ask a witness for e prosecution, on cross-examination, collateral and irrelevant questions, iz.: whether he had ever been tried or sentenced for desertion, with a iew to contradicting him, (on his answering in the negative,) by subseuent testimony in chief, which also was allowed to be introduced against e objection of the judge advocate. In permitting this to be done, the ourt disregarded one of the fundamental rules of the law of evidence, nd its action is disapproved."

1. 1 Greenl. Ev. § 449, 450. That these questions may be asked notithstanding the rank of the witness, see DIGEST, 254, and General rders there cited.

2. See the principle recognized in military cases, as to the expressing hostility by the witness, in G. C. M. O. 8, Fourth Mil. Dist., 1867; O. 11, Dept. of Cal., 1865; Do. 8, Div. of the Atlantic, 1875;—as the making of different statements by the witness, in G. C. M. O. 40 1880; Do. 8, Fourth Mil. Dist., 1867; Do. 23, Dept. of Texas, 1873; O. 31, Dept. of Dakota, 1869.

statements, as also (if desired) of his *motives* in making the same. But this is, strictly, the full scope of a re-examination, which cannot in general extend to the bringing out of new matter,[1] and hence the desirableness of exhausting a witness as far as possible on the original examination.[2]

Where, however, upon the cross-examination, the opposite party has been allowed to go into matters not testified to upon the direct examination, the other party will become entitled to re-examine as to the subjects of the testimony thus introduced.

Rebutting evidence. New evidence introduced on the defence, or otherwise, may always be rebutted by the opposite party. Rebutting evidence is direct evidence, and the same rules apply to it as to the direct examination. It should be noted that mere *cumulative* evidence, or evidence repeating facts already introduced at a previous stage, is not in general properly admitted by way of rebuttal.

Exceptions to course of examination. As to the authority of the court, in its discretion, to allow a party to recall a witness once dismissed, for further examination as to a material point inadvertently omitted to be inquired into, or a point since brought to the attention of the party, or for further cross-examination where the regular cross-examination has been closed; or to allow a witness to be further examined, or new witnesses to be introduced by a party, after he has rested his side of the case, or both sides of the case have been closed,—remark has been made in Chapter XVII, in considering the course of proceeding on the trial.

Examination by the court. In the same Chapter is also noticed the subject of the extent of the authority of the *court* to examine the witnesses and of the practice as to the form and occasion of such examination.

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1. See 1 Greenl. Ev. § 467. "On the re-examination no questions can be put which do not relate to matters inquired into on the cross-examination." Dutton *v.* Woodman, 9 Cush. 255.

2. "On the examination in chief, the party calling a witness is bound at his peril to interrogate him as to all material matters in the first instance; and if any material question is omitted it cannot be put upon the examination in reply." Sartorious *v.* State, 24 Miss. 609. But while this is the strict rule, the court may, in its discretion, make exceptions in the interests of justice.

The Privilege of the Witness as to not Answering Criminating, &c., Questions.

Vith the subject of cross-examination is connected that of the vilege of the witness to decline to answer certain classes of stions which more usually come to be asked at that stage of examination.

Questions the Answer to which may Criminate. The inciple is well established that a witness may refuse and cannot required to answer a question the answer to which may tend criminate him; or, as it is expressed by Greenleaf,[1] "have a ndency to expose him to a penal liability, or to any kind of nishment, or to a criminal charge;" or even, in the language Chief Justice Marshall,[2] form a link in the "chain of testiony which is necessary to convict an individual of a crime." he privilege is held to be one personal to the witness which he ay avail himself of or not as he sees fit,[3] and it is further held at it is the duty of the court, if the witness declines or hesitates answer, to determine whether the question has the supposed ift and instruct him as to the exercise of the privilege.[4] If it exercised, no legal inference as to the truth of the matter hich was the subject of the inquiry is permitted to be drawn.[5]

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1. 1 Evidence, § 451. And see Manual, 84.
2. 1 Burr's Trial, 244.
3. In a case in G. O. 48, Dept. of the South, 1869, where the ques-n—"Were you under the influence of liquor at this time," addressed a witness, was objected to by a member on the ground that the answer ght criminate, and ruled out by the court, the Reviewing Officer, en. Terry,) in disapproving this action, remarks:—"The question s one of undoubted propriety and competency, as tending to show the ight or degree of credibility to be attached to the testimony of the tness. It in no wise tended to implicate him in the commission of any ence, military or civil, nor could the answer in any manner, direct or lirect, tend to degrade his character. Moreover, questions of the aracter indicated, are not subject to objection by a member of the urt, the judge advocate, or by the accused. The right to answer or t as he pleases, *is the privilege of the witness*, and concerns neither court nor any of its members. This privilege may be waived or erted in the witness' discretion; and the duty of the court is fulfilled en it informs him of his right and leaves him free to exercise his dis-tion in the premises."
. 1 Greenl. Ev. § 451; Com. *v.* Shaw, 4 Cush. 594.
. 1 Greenl. Ev. § 451, and cases cited in note.
ls to the effect of the provision of Sec. 860, Rev. Sts., upon the exer- of this right, see Opin., At. Gen., of October 27, 1883, in case of et Hackett.

The privilege cannot, of course, be claimed where the cri liability has ceased;—as where the witness has been finally for the offence referred to in the question;[1] or prosecutic the same has been barred by the statute of limitations.[2] can it be claimed on the cross-examination where the wi has voluntarily testified without objection as to the subject o question on the examination-in-chief.[3]

In military cases the principle has, properly, been recogi where the answer to the question might subject the wi either to a *military or a civil* prosecution.[4]

Other Questions. The privilege under consideration ca be asserted where the question is such that the answer merely subject the witness to a civil action or a pecuniary li ity;[5] nor can it be asserted though the answer, (while not c inating,) will tend directly to degrade or disgrace the witn unless indeed the question relate to some matter wholly colla and irrelevant to the issue.[7] If indeed the question, (having tendency to disgrace the witness,) refer to a fact which can p erly be proved only by documentary evidence,—as the fact criminal conviction, or of an imprisonment or other ignomin punishment as the result of a conviction,—it is not compe for the *special* reason that such fact can legally be establi only by the record.[8] There is also another important limita

1. See G. O. 29, Army of the Potomac, 1864.

2. Roberts *v.* Allatt, 1 Mood. & Malk. 192; U. S. *v.* Smith, 4 1 123; People *v.* Mather, 4 Wend. 255.

3. People *v.* Freshour, 55 Cal. 375. Nor does the protection ex to the case of an *accomplice* voluntarily testifying for the prosecu That the *accused*, when on the stand as a witness, cannot claim the ilege *as to the offence for which he is on trial*—see Wharton, Cr. § 432.

4. Lieut. Kennon's Trial, p. 29, 41, 43; G. O. 48, Dept. of the So 1860. See also Capt. Barron's Trial, p. 84, 98, where the rule was ap to a case of a witness who was actually under charges growing out o same transaction, (as that which had given rise to the charge ag the accused, and was soon to be tried.

5. 1 Greenl. Ev. § 452; Manual, 84.

6. 1 Greenl. Ev. § 454.

7. 1 Greenl. Ev. § 455; U. S. *v.* White, 5 Cranch C. 73.

8. 1 Greenl. Ev. § 457. The subject of such questions has been ulated by special provisions in the British law. See Rules of Proce 90, Manual, 89.

the asking of questions that may disgrace the witness—viz. that they must be questions which, relating to comparatively recent transactions, go to his present credit as a veracious and reliable person: if they do not directly affect his credit *as a witness*, they are not properly admissible.[1]

5. *Impeaching Testimony.*

The credit of a witness who has been examined in chief is subject to be impeached, not only by counter evidence from the other side as well as by facts brought out in his cross-examination, but also by testimony bearing directly upon his *personal veracity*. This, which is that commonly intended by the term "impeaching testimony," is either particular or general, being (1) testimony that the witness has made specific statements out of court contrary to what he has testified on the stand; or (2) testimony attacking his general reputation as a truthful person.

Testimony as to Contradictory Statements of the Witness. Such testimony is competent only in respect to matters which are relevant and material to the charge. To properly prepare the way for such testimony, the established procedure is, first to ask the witness, on the cross-examination, not in general terms whether he has not made a different statement, or different statements, but whether he did not on a certain occasion make a certain diverse statement, (specifying it,) to a certain person named: this, in order that he may better remember what he has said on the subject out of court, and be afforded an opportunity to correct or explain his testimony as given—a practice clearly in the interest of truth and justice.[2] This rule has been

1. 1 Greenl. Ev. § 458, 459; U. S. *v.* Van Sickle, 2 McLean, 219; Davis *v.* Forrest, 2 Cranch C. 23; U. S. *v.* Masters, 4 Id. 479.

2. The Queen's Case, 2 Brod. & Bing. 313; 1 Greenl. Ev. § 462. In Conrad *v.* Griffey, 16 Howard, 46, McLean J. says:—"This rule is founded upon common sense, and is essential to protect the character of a witness. His memory is refreshed by the necessary inquiries, which enable him to explain the statements referred to, and show they were made under a mistake, or that there was no discrepancy between them and his testimony." And see McKinney *v.* Neil, 1 McLean, 540; U. S. Dickinson, 2 Id., 325. In the latter case it was held that it is not proper to call, in the first instance, *another* witness, and ask *him* if the witness intended to be impeached has not made a contradictory statement. The latter must first be asked, on the cross-examination, whether he has not made such previous statement, and if he replies in the negative, the

recognized in military cases.[1] Where the previous stateme the witness was in *writing*, and contained in a letter or paper, it is not considered competent to ask him whether h written a certain thing, stating its substance or character; proper practice is to put the paper into his hands, or at lea exhibit to him the material portion of it, and to then ask whether or not he wrote it.[2]

That the party calling the witness cannot *confirm* his orig statement, (after it has been impeached by evidence of his hav made a different one,) by showing that he has at other times m statements to the *same* effect as that originally given under —appears to be established by the weight of authority.[3]

Testimony Impeaching the General Reputation Truth of the Witness. This is the most familiar form of tacking the credit of witnesses; a party being always permi to impeach the testimony of a witness to the merits, introdu by the adverse party, by evidence impugning his character veracity.[4] But this evidence must be *general*—must relat the *general reputation* of the witness as a truthful person, at time of his testifying;[5] for, as it is well settled, evidence of par

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impeaching witness may subsequently be called and interrogated a the fact. It is to be noticed that the species of evidence under sideration is admitted for purposes of impeachment purely, not for p of the previous statements. Thus in The Elvira, Gilpin, 60, the C hold that—"A previous and contradictory statement of a witness be given in evidence to impeach his credit, but not as proof of the formerly stated." Or, in other words, (p. 61,)—"You cannot sub tute the other account in place of that which you have discredi making it thus the evidence of the cause."

1. See G. O. 31, Dept. of Dakota, 1869.

2. See 1 Greenl. Ev. § 463, 465; Murphy *v.* May, 9 Bush, 33. I C. M. O. 40 of 1880, the credibility of a witness was held properly peached by the production of the record of a court of inquiry con ing a different statement made by him as a witness under oath.

3. See Ellicott *v.* Pearl, 10 Peters, 439, remarks of Story J.; V *v.* Ware, 8 Greenl. 42; Hurd *v.* State, 44 Miss. 731; People *v.* Do 48 Cal. 85. *Contra*, see U. S. *v.* Neverson, 1 Mackey, 153.

4. An accused party taking the stand as a witness may be impea like any other witness. Wharton, Cr. Ev. § 433.

5. People *v.* Haynes, 38 How. Pr. 369. The object of the testi is to ascertain the reputation for veracity of the witness *at the time trial*, but it may extend over a reasonable time previous, and to diff places when the domicil of the witness has been changed. Hamilt People, 29 Mich. 173.

deceits, falsehoods, false conduct, &c., of the witness is wholly missible.[1] The impeaching witnesses are not called to comicate their personal knowledge in regard to his speaking or not aking the truth,[2] or their own estimate or opinion of him as a acious person or the reverse,[3] but his reputation or character for th among his neighbors or those with whom he is chiefly consant.[4] And this—what his reputation is—they must know of ir own knowledge;[5] it is not sufficient for them to state what y have heard others say as to such reputation.[6] And ordinary the impeaching witnesses should properly themselves come m the neighborhood, place of residence, military station, &c., the witnesses, though it is not necessary that they should ve a personal acquaintance with him.[7]

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1. "The examination must be confined to his general reputation, and be permitted as to particular facts; for every man is supposed to be able of supporting the one, but it is not likely that he should be prered to answer the other without notice." 1 Greenl. Ev. § 461. And Teese *v.* Huntingdon, 23 Howard, 2; Wike *v.* Lightner, 11 Sergt. Rawle, 198; Wilson *v.* State, 16 Ind. 392; Taylor *v.* Com., 3 Bush, 3; Lieut. Hyder's Trial, 157.

Nor—according to the weight of authority in this country—is it admissible to inquire, either as to the moral character of the witness generally, or as to particular immoral or criminal acts on his part. Teese *v.* Huntingdon, *ante;* U. S. *v.* Vansickle, 2 McLean, 219. Thus it has been held that it cannot be asked, for the purpose of impeaching a female witness, whether she was not a prostitute. Spears *v.* Forrest, 15 Vt. 435; Com. *v.* Churchill, 11 Met. 538; U. S. *v.* Dickinson, 2 McLean, 329. evidence that he was a deserter from the army has been held not to admissible to impeach the character for veracity of a witness in a criminal court. Foley *v.* People, 22 Mich. 227. That "proof of a conviction or sentence for desertion, or other military crime," does not affect the credibility of a witness by impeaching his veracity"—see G. M. O. 45, Dept. of Cal., 1883.

2. People *v.* Methvin, 53 Cal. 68.

3. Kimmel *v.* Kimmel, 3 Sergt. & Rawle, 336.

4. Douglass *v.* Tousey, 2 Wend. 354; Teese *v.* Huntingdon, *ante;* Kimmel *v.* Kimmel, *ante;* Wight *v.* Lightner, *ante;* G. C. M. O. 128, Dept. of Dakota, 1882.

5. "That knowledge of character which is gained from report cannot be considered as *secondary*, for report constitutes character." Gibson in Kimmel *v.* Kimmel, *ante.*

6. Kimmel *v.* Kimmel, *ante;* Vernon *v.* Tucker, 30 Md. 456. Such evidence would be mere *hearsay.* Douglass *v.* Tousey, *ante.*

7. Kimmel *v.* Kimmel, *ante.* "There is danger from the proneness often observable in witnesses to substitute their own opinion for that the public, whose judgment cannot be so readily warped by prejudice

Procedure. The most approved *form* of the direct e tion of an impeaching witness is simply to ask him if h the general reputation of the adverse witness for veracit if he answers in the affirmative, to ask him further to sta that reputation is.[2] In the English and in some of the A courts the practice has been to allow the further question, w knowing such reputation, he would believe the adverse under oath. But this question, though sometimes perm be asked upon military trials, is one which seems not to be aged by the weight of authority in this country,[3] inasmu calls for the individual estimate of the witness—a thin avoided in this proceeding, and invites an answer liabl influenced by personal hostility or prejudice.[4]

The impeaching witness having given unfavorable testi remains subject to be *cross-examined* by the other party as means and sources of his knowledge. He is generally calle to specify the particular individuals whom he has heard unfavorably of the character for truth of the witness atte to be impeached, and may be interrogated as to the ground which they based their opinions.[5] The adverse party turn impeach the impeaching witnesses, or—as is oftener

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or feeling as that of an individual; and hence the policy of not ing any intimate degree of knowledge respecting the person him of bringing the witness too close to the scene." Id. (Gibson J.)

1. "General reputation *for veracity*," (or "*truth*," or "*truth racity;*") not "general reputation"—without qualification. W Young, 31 Wisc. 574. "Reputation" is a better word than " ter." Knode *v.* Williamson, 17 Wallace, 586.

2. Or the two questions may be consolidated—"Do you k general reputation for veracity, and if so what is it?"

3. See 1 Greenl. Ev. § 461; Teese *v.* Huntingdon, *ante;* Phi Kingsfield, 19 Maine, 375; People *v.* Methvin, 53 Cal. 68; People irez, 56 Cal. 533.

4. See Phillips *v.* Kingsfield, *ante.*

5. "On the cross-examination, the inquiry may extend to the opportunity for knowing the character of the other witness, for h a time and how generally the unfavorable reports have prevail from what persons he has heard them." Phillips *v.* Kingsfiel The impeaching witness may be asked, on cross-examination, the *names* of the persons whose statements have made up the reputation to which he has testified, but *what they said.* A People, 13 Mich. 11. And see Bates *v.* Barber, 4 Cush. 107; 1 Ev. § 461.

may support the general character for veracity of his own ;inal witness by testimony showing it to be good.[1]

6. *Testimony as to Character.*

Admissibility of in Defence, on Criminal Prosecutions. may be regarded as settled law that evidence of good gen- al character, as possessed prior to the commission of the alleged fence, may be introduced by the accused as part of his defence, ovided the character shown is of such a nature that it may operly weigh with the jury in determining the issue involved the case. Whether the evidence be deemed admissible as per- ent to the question of criminal intent,[2] or as sustaining the iginal presumption of innocence,[3] or as a fact going to show at it is unlikely that the accused could have committed the ime and thus contributing to a reasonable doubt upon the whole se,[4]—it is in general admitted if it be in any degree apposite the species of criminality charged. Thus while a general putation as a moral well-conducted person and law-abiding tizen would be admissible in evidence upon criminal trials in neral, a character for peaceableness would not be apposite to e defence in a case of larceny, though it might be entirely ap- site under an indictment for violent homicide.[5]

Evidence as to character is sometimes referred to as especially nificant in *doubtful* cases; but, where otherwise admissible, ither the nature of the offence nor of the proof can properly fect its competency.[6]

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1. See 1 Greenl. Ev. § 461; Manual, 90. In Bunnell *v.* Butler, 23 nn. 65, it is held that the court "may, in its discretion, limit the num- r of impeaching witnesses," and that "the proper exercise of such cretion is no ground of error. And in this case the number was lim- d to *six* on each side. In People *v.* Murray, 41 Cal. 66, it was held t error to have limited the impeaching witnesses to *eight.*

2. 1 Greenl. Ev. § 54, note; 3 Id. § 26.

3. 1 Bishop, C. P. § 1112; Manual, 64.

4. See Wharton, Cr. Ev. § 57. It is deemed to have more force ere the proof is circumstantial than where it is direct and positive. S. *v.* Babcock, 3 Dillon, 620.

5. See 2 Russell, 784; 1 Greenl. Ev. § 55; 3 Id. § 25; Wharton, Cr. . § 60; 1 Bishop, C. P. § 1113; Cathcart *v.* Com., 37 Pa. St. 108. In ple *v.* Garbutt, 17 Mich. 9, a case of homicide, evidence that the ac- ed, when in the army, was reputed a good and brave soldier was held imissible.

. Wharton, Cr. Ev. § 66; 1 Bishop, C. P. § 1115.

It must be evidence of *general* character or reputation.[1] Pa ticular acts of good conduct are not admissible.[2]

This testimony is admitted subject, like any other, to cro examination.[3] It may also be rebutted by evidence of bad char ter; but such evidence cannot include particular acts or condu but must be as general as that to which it replies.[4]

It is settled law, however, that the general character of t accused cannot be attacked until he has himself first introdu evidence to sustain it, or—in the language of Wharton[5]—"u less the defendant puts his character in issue, the prosecut cannot call witnesses to impeach it."

It is also well settled that the fact that the accused offer his defence, no evidence in support of his general character, furnish in law no unfavorable influence or impression ag him—can afford no presumption, however weak, either "tha is guilty of the offence charged, or that his character is bad.'

In military cases. At military law, evidence of chara which is always admissible,[7] is comparatively seldom off

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1. "In view of the fact that 'the best character is generally that v is the least talked about,' the courts have found it necessary to p witnesses to give *negative* evidence on the subject, and to state that 'never heard anything *against*' the character of the person on w behalf they have been called." Wharton, Cr. Ev. § 58.

2. Wharton, Cr. Ev. § 60; 1 Bishop, C. P. § 1117.

3. In a case in G. C. M. O. 66 of 1875, a witness for the defence, h testified that the character of the accused was good, was asked, on examination, by the judge advocate—"Whom have you heard giv accused a good character?" To this question an objection was r and was sustained by the court. *Held* by the Secretary of War th objection "should have been overruled."

4. "Particular good or bad acts * * * * cannot be sho proof or rebuttal of good character." 1 Bishop, C. P. § 1117.

5. Cr. Ev. § 64. And see this principle recognized in G. O. Dept. of the Mo., 1863; Do. 11, Dept. of the Susquehanna, 1864 65, Div. of the Atlantic, 1864; Do. 29, First Mil. Dist., 1867; D Dept. of the South, 1870; Do. 52, Dept. of the Platte, 1871; G. O. 58, Dept. of Texas, 1872; Do. 10, Id., 1882; DIGEST, 254-5.

6. Wharton, Cr. Ev. § 62. And see 1 Bishop, C. P. § 1119; P v. Bodine, 1 Denio, 282.

7. While in the American and the British military practice evi of character and record is introduced by the accused, in the F the Government puts in the military history, (*état des services*,) accused at the beginning of every trial. See, for example, Le I Bazaine, Moniteur edition, Paris, 1873, page 3.

:tly or exclusively *in defence;* but, when introduced, is usually :nded partly or principally, *as in mitigation of the punishment* ch may follow upon conviction. With this view it is pre-:ed not only in connection with a plea of "guilty," but as a :autionary measure where the plea is "not guilty," and both :re the sentence is discretionary and where it is mandatory. is offered, it is not subject to the rules which restrain the e and quality of such testimony when defensive merely. It d have no reference to the nature of the charge, but may ex-it the reputation or record of the accused in the service, for ciency, fidelity, subordination, temperance, courage, or any of : traits or habits that go to make the good officer or soldier. also need not be limited to *general* character, but may include ticular acts of good conduct, bravery, &c. It may also be her oral or written; consisting, if the latter, of testimonials m superior officers, recommendations for promotion, honorable ation in orders, certificates of merit, warrants as non-commis-ned officers, honorable discharges, &c., of which the originals copies should be appended to the record of trial. Such evi-nce, in the event of conviction, may avail to lessen the measure punishment if the same be discretionary with the court; if ndatory it may form the basis of a recommendation by the mbers and a mitigation or pardon by the reviewing officer. much a matter of course is the admissibility of evidence of od character on a military trial, that, where the same exists, accused should be allowed all reasonable facilities for obtain-; it: where it cannot be procured without too considerable a ay or other embarrassment to the service, the fact of its ex-nce and its substance will in general properly be formally mitted of record, by the prosecution.

IV. Testimony by Deposition.

Article 91. The written military law in regard to Depositions comprised in the present 91st Article of war—originally s. 27, 75, Act of March 3, 1863—as follows: "*The depositions of wit-ses residing beyond the limits of the State, Territory, or district which any military court may be ordered to sit, if taken on rea-able notice to the opposite party and duly authenticated, may be d in evidence before such court in cases not capital.*" The ef-of this statute is deemed to be, not merely to indicate when ositions shall be admissible as evidence, but to *entitle* parties

to the depositions, of witnesses when their personal testi cannot practicably, or without too great a delay or expen other prejudice to the service, be obtained.

Construction of the Article—"*The depositions of witnesses.*" In the earlier provision on this subject—Art. the code of 1806—the term "witnesses" was qualified by words, "not in the line or staff of the army," and practi included civilians only.[1] The present Article, containing such qualification, is held to authorize the admission in evid of depositions of military as well as civil persons, and such been its construction in practice. When officers or soldiers stationed at remote points where their services cannot wel dispensed with, their evidence is commonly obtained by dep tion; and this course is also in general pursued where the t mony of officials at Washington, (as chiefs of the staff corps, required at distant trials.[2]

"***Residing beyond the limits of the State,*" &c.** Article, in providing for the admission of depositions taken u certain specified conditions, must be regarded as excluding th where these conditions do not exist.[3] Thus depositions of p sons residing *within* the limits indicated are not admissible, cannot be read in evidence, *though the parties may consent the court acquiesce.*[5] The term "residing," as applied to milit persons on the active list, is ordinarily to be construed as equ alent to *stationed* or *on duty.*

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1. It is remarked on Gen. Pillow's Court of Inquiry, p. 375, that provision of 1806 was restricted to *civil* persons because such could (then) legally be required, (as now by Sec. 1202, Rev. Sts.,) to att as witnesses before courts-martial.

It may be noted that in the earliest provision on this subject— original of the present Article in our law, *viz.* a Resolution of Cong of Nov. 16, 1779, there is no such restriction, the statute providing general terms—"That in cases not capital in trials by court-mart depositions may be given in evidence," &c. 3 Jour. Cong., 392.

2. DIGEST, 74, 484. That the Article authorizes the admission deposition of a witness residing in a *foreign* country, see DIGEST,

3. See II Opins. At. Gen., 344; Gilchrist, 24.

4. DIGEST, 74; G. O. 32, Dept. of Cal., 1866; G. C. M. O. 102, D of the East, 1871; Do. 1, Div. of the South, 1875.

5. DIGEST, 74.

If taken on reasonable notice to the opposite party."
at shall be "reasonable notice" is not indicated by law or ılation,[1] nor has the practice established any general rule on subject. The period should depend mainly on the nature importance of the case, the extent and materiality of the imony sought, the situation of the opposite party, the existing us whether of peace, war, or other emergency, &c. In gen-, all that the notice is really needed for is to afford the party icient time within which, (in consultation with his counsel ıe has any,) to examine the interrogatories, note objections, desired,) and prepare cross-interrogatories. For this a few s will ordinarily be a "reasonable" period.

'he notice may be given, under the Article, at any time after issuing of the order convening the court at a certain place ıed; for till the order is made it cannot be determined whether particular witness whose deposition is proposed to be taken ı person "residing beyond the limits of the State, &c., in ch the court is ordered to sit," and therefore one whose depo-ɔn can legally be "read in evidence" in the case. The notice ' thus be given, (and the deposition, if there is time, be taken,) ır to the assembling and organization of the court. In prac-, the taking of depositions is not unfrequently initiated before arraignment; and it is sometimes resorted to at a much later e. Where, pending the trial, a deposition is desired to be ıined, the court will, if necessary, properly grant a continu-: to await the arrival of the testimony.

deposition taken without notice, or without reasonable no-, should, if objected to, be ruled out as inadmissible.[2] A dep-

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The only statute in which a period of notice has been prescribed the Resolution of Dec. 24, 1779, (3 Journals, 415,) where it was e to depend on the distance between the residence of the witness that of the opposite party, with a view to enable him to be present, represented, at the examination. In the present practice it is most that either party is thus present or represented. See *post*—"Pro-ure."

. In a peculiar case published in G. C. M. O. 9 of 1879, it was held he Judge Advocate General that a certain deposition was inadmissi-ıs taken without notice, the witness being a person who, without the :urrence of the opposite party, had been substituted for the original ıded deponent. See DIGEST, 75. In a case in G. C. M. O. 45, of the Pacific & Dept. of Cal., in which a deposition was objected taken without notice, it was remarked by the reviewing authority a statement, added by the judge advocate at the end of the Inter-

osition taken without notice is indeed no more than an *ex pa* affidavit; and affidavits, or statements of persons not subjected cross-examination, are of course incompetent as evidence befo courts-martial.[1]

The objection, however, to a notice as *not reasonable* woul properly come from the adverse party rather than from the court. Such party may, if he see fit, (the requirement as to notice bei for his benefit,) *waive* any objection that he might make on th ground of insufficient notice, and upon such waiver the depo tion, (if otherwise in conformity with the Article,) will be admi sible in evidence.

"*And duly authenticated.*" The earlier statutes, from th Resolution of Dec. 24, 1779, to Art. 74 of 1806, provided that th deposition should be taken "before some justice of the peace." The present Article not designating any person as proper to a as commissioner, it is clear that any official who, by the laws o the United States,[3] or of the State, &c., is authorized to admi ister oaths, may qualify the witness and authenticate, by his o

rogatories, that the prisoner had no cross-interrogatories to ask, was proof of notice, being merely an *ex parte* declaration.

1. It has been repeatedly so held in Orders. See G. C. M. O. 33 1873; Do. 133, Dept. of the Mo., 1871; G. O. 21, Id., 1863; Do. Dept. of Ark., 1866; Do. 19, Third Mil. Dist., 1867; Do. 49, Dept. Dakota, 1871; Do. 165, Id., 1882. In a case in G. C. M. O. 37, De of the East, 1870, where the court admitted in evidence the affidavit o witness sick at the post, instead of adjourning to his quarters to take testimony, its action was disapproved by the reviewing authority. G. C. M. O. 19, Dept. of Texas, 1873, a letter from a post adjuta introduced in evidence, was held improperly admitted, being, thou official, a mere *ex parte* statement. In G. C. M. O. 84, Dept. of t Mo., 1882, certain *ex parte* statements, contained in a record of board of survey, were held improperly admitted in evidence upon a tr by court-martial.

Affidavits, however, have sometimes been admitted by the court the absence of objection by a party. On Maj. Gen. Arnold's trial, (1779 —the most marked instance met with by the author—they were admit freely on both sides. See pp. 20, 37, 55, 63, 77. But, notwithstand the consent of the parties, a court-martial could rarely with safety rece evidence of this character, which must in general be too incomplete serve as a reliable basis either for its own judgment or the action of t reviewing officer.

2. If, indeed, he is ignorant, the court, on perceiving no indicatio the deposition papers, that due notice was given, may and should ad him as to his right to object.

3. See Sec. 863, Rev. Sts.

. signature, and seal if he has one, the deposition.[1] Where the iiness of procuring a deposition to be taken is committed to a :ticular officer of the army, he will properly, by an official cercate to that effect, further authenticate the deposition as duly ken.[2]

"*May be read in evidence.*" This does not mean that the ıtire deposition as taken shall necessarily be admitted in evience, but that it shall be admitted subject to such objections ır immateriality, irrelevancy, &c., as may have been noted or ıay be raised upon its being read, to the questions or answers. n other words it is to be read and received subject to the same xceptions as would be the oral testimony for which it is a subtitute.

A deposition should not be rejected for a mere *informality*. If omplete—if it contains the entire testimony, under oath or afimation, of the witness, in response to all the material interogatories—it should be admitted.[3]

The party by whom the deposition was initiated has no right) withhold it merely because the testimony given is not favorable : such as was expected. Nor can he introduce only such parts : are favorable or useful to him, omitting the rest. He must fer it as a whole or not at all. And if *he* does not offer it, the her party may do so if he chooses: if neither offers it, it is not id and forms no part of the proceedings,[4] unless possibly the urt may require the same for its information or the elucidation the case.

"*In cases not capital.*" Defining "capital" as *punishable ritally*,[5] it results from this limitation that depositions cannot read in evidence in cases of spies, of deserters (or of officers or ldiers advising or persuading desertion) in time of *war*, or of

1. DIGEST, 74; Lieut. Kennon's Trial, (Navy,) p. 16.
2. See *post*—"Procedure."
3. Fuller *v.* Rice, 4 Gray, 343.
4. See Pelamourges *v.* Clark, 9 Iowa, 2; Wheeler *v.* Smith, 13 Id., 54; Nash *v.* State, 2 Greene, 287; DIGEST, 74.
5. See DIGEST, 42; Imperial Dictionary—"Capital." This is the ense uniformly ascribed, in this treatise, to the word as used in the rticles generally, and this is the sense attributed to it in the practice of he service.

persons charged with any of the offences specified in Article 22, 23, 39, 41, 42, 43, 44, 45, 46, 56, and 57, or in Art. 58 w made capital by the local law. This limitation is regarde absolute, and it is held that a deposition cannot legally be in duced in evidence in a capital case by either party, even if other party waives objection to its admission.[1]

Procedure. In the absence in the military law of any p visions, (such as those in the statutes of the United States[2] a of the several States,) regulating the taking and using of dep tions, the military procedure in this respect has not been unifor and the depositions themselves have usually been inartificia made up.

A deposition may be taken—as sometimes in civil cases—b both parties appearing, personally or by counsel, before a commi sioner, and propounding questions to the witness. This cour however, is rarely pursued in military cases.

In general, in such cases, the taking of a deposition is initiate substantially in one of the two following forms:

1. The party desiring the testimony of a certain distant wi ness, whose personal attendance cannot, as it has been asce tained, well be secured, serves upon the opposite party a noti in writing, to the effect that the deposition of the witness wi be taken at a certain time and place and by a certain officer o person named,[3] or—as it is more commonly expressed—by suc officer or person and at such time and place as shall be desig nated by the proper superior authority, upon the Interrogatories annexed to the notice and such Cross-Interrogatories as the party notified may present; and desiring him to serve a copy of the sa upon the party giving the notice within a reasonable time. Th party notified transmits in due time to the other party a draft o his Cross-Interrogatories, (with his objections, if he desires t note any at this stage, to the Interrogatories,) and the origin party, (similarly, if he sees fit, noting his objections to the Cro Interrogatories,) thereupon duly forwards the whole to the pe son who is to take the deposition, or to the proper milita

1. II Opins. At. Gen., 344: DIGEST, 74.

2. See Rev. Sts., Secs. 863-870.

3. An officer of the army is in general to be preferred, since, if a civ commissioner is employed, an indebtedness for *fees* will ordinarily b incurred.

hority to be disposed of according to his orders. Objections d not be thus noted, but may, and generally are, left to be sed at the trial. The original party, before forwarding, may l *re-direct* Interrogatories, (serving a copy on the opposite rty,) if he thinks it desirable.

2. Or, as if by far the preferable mode where practicable to opt it, the parties—the accused and judge advocate—enter into d subscribe a written STIPULATION,[1] by which it is agreed that e deposition of the witness shall be made and forwarded by him rectly, or shall be taken by a particular officer mentioned or an ficer to be designated for the purpose by the proper superior,—pon certain annexed Interrogatories agreed upon by the parties intly, (or Interrogatories and Cross-Interrogatories contributed y them respectively where they cannot thus agree,) subject to ch objections either to questions or answers as either party may roperly raise before the court.

The Stipulation is itself evidence of "reasonable notice" given, d is a waiver of any irregularities that may have attended the oceeding. It may well include an agreement that the depoion when returned shall first be opened by the president of the urt in the presence of the court and the parties.[2] The stipuion, with the appended Interrogatories, should be forwarded the judge advocate, either to the witness directly, or to the cer named, or to the Commander for his action—according to agreement of the parties.

Where the Interrogatories have been forwarded to the witness ectly, he will proceed to make in writing under oath[3] his wers thereto, and will thereupon return the whole to the sident of the court, or other officer or person as stipulated or uested. Where the witness is *an officer of the army*, the fording of the Interrogatories thus directly, with a view to his king up and returning the deposition similarly directly, may en be the preferable course of proceeding. The usual practice, wever, is both to forward and return through the proper miliry headquarters.

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1. See form in Appendix.

2. See *post*.

3. Witnesses, in making their depositions, have sometimes sworn to e same at the end, *i. e.* after all the answers have been given. The gular course is to be sworn at the beginning, as other witnesses are orn under Art. 92.

Where the Interrogatories have been forwarded directly, or through military channels, to an officer or other person, as a commissioner or agent to take or cause to be made the deposition, such officer will proceed to meet or communicate with the witness as soon as practicable, and to take or procure in writing his sworn answers *seriatim* to the interrogatories as propounded by the parties or party. These, being signed and duly certified and sworn to, are, with such documents or other writings as may have been called for from the witness or referred to in his answers, appended to the Interrogatories, and the Deposition thus made up, being authenticated by the certificate of the officer, &c., as duly taken, is, together with the order or orders, if any, exhibiting the authority of the officer, forwarded by mail or otherwise to the headquarters of the proper commander for transmission to the court, or directly to the president of the same or to a party in the case, as may have been stipulated or directed.

The deposition, it may be remarked, whether returned directly or through military channels, is properly transmitted or delivered to the president of the court rather than to the judge advocate, the latter being commonly a *party* to the proceeding. The deposition, to whomever forwarded, should properly be *first opened in court and in the presence of both parties.*[1] When opened it may be rendered to the party at whose instance it was taken, (if not already in his possession as originally transmitted to him,) or to the judge advocate, to be "read in evidence."

V. THE CREDIBILITY AND WEIGHT OF ORAL TESTIMONY.

In addition to what has been remarked on this subject under the foregoing Titles, there may further be noted certain legal rulings and practical considerations, as of value to the court in estimating the abstract importance and relative force of testimony in connection with its Finding.

The Testimony of Accomplices. While the testimony of an accomplice, if believed, may be sufficient, though unsupported, to warrant a conviction, it is agreed by the authorities that, as a general rule, such testimony cannot safely be accepted

1 It has been held a fatal objection to a deposition that it was opened out of court. Beale v. Thompson, 8 Cranch, 70. Such objection, however, may be waived by the interested party, and the deposition admitted in evidence in the discretion of the court.

equate for such purpose unless corroborated by reliable evi-
e.[1] It need not indeed be confirmed as to all its parts: if
ined as to some material and important points, it may in
ral be credited as to others.[2] It is held, however, that the
boration must certainly extend to the *identity*, (where that
question,) of the person of the accused.[3]

stimony Impeaching or Affecting Credit. Even where
character for veracity of a witness is shown to be bad, his
mony is not necessarily to be altogether disregarded, but is
considered in connection with the rest of the evidence, and
credit given to it as it may be found justly entitled to.[4]
where a witness is shown to have testified falsely as to a cer-
particular, the maxim *falsus in uno falsus in omnibus* is not
ssarily to be applied, nor is all his testimony necessarily to
isregarded. The presumption against his general veracity
indeed be strong where the false statement relates to some
er as to which he can scarcely be liable to mistake; still
gh the falsity may be such as to discredit him in general, it
not follow that some portions of his testimony may not be
s

lsehood and disingenuousness in witnesses are, as has been
rked in practice, not unfrequently indicated by their avoid-
of particularization in their testimony. "Fabricators,"
s Wharton,[6] "deal usually with generalities, avoiding cir-
tantial references which may be likely to bring their state-
s into collision with other evidence; and hence it is prop-

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1 Greenl. Ev. § 380; Wharton, Cr. Ev. § 441; 1 Bishop, C. P. §
U. S. *v.* Kessler, Baldwin, 22; U. S. *v.* Lancaster, 2 McLean, 431;
. *v.* Troax, 3 Id. 224; Steinham *v.* U. S., 2 Paine, 168; U. S. *v.*
ies and Smith, 2 Bond, 311, 323; U. S. *v.* Babcock, 3 Dillon, 619;
. 14, Dept. of Dakota, 1868. That the rule in regard to accom-
does not apply to *informers*, see 1 Greenl. Ev. § 382; U. S. *v.*
rson, 3 McLean, 53, 299.

U. S. *v.* Kessler, *ante*.

See Wharton, Cr. Ev. § 442.

State *v.* Miller, 53 Iowa, 209.

Wharton, Cr. Ev. § 380; The Santissima Trinidad, 7 Wheaton,
Hall *v.* Renfro, 3 Met. (Ky.) 51; State *v.* Brantley, 63 No. Ca.
Shellabarger *v.* Nafus, 15 Kans. 547.

Cr. Ev. § 379. On the other hand, an over-minute specification of
ls, especially as to remote events or unimportant matters, does not
o the credit of a witness but rather the reverse. Id.; O'Brien, 219.

erly held that a studied avoidance of details, by witnesses, thro suspicion on their statements. This however," it is added, "de pends upon the object to be recalled;" it being not to "even of remote date," but to "matters which the witness, under ordi nary circumstances, would remember," that the test most "fairl applies."

The testimony of a witness should not be regarded as impeach ed by the fact that his statement differs from those of oth witnesses as to the secondary details of an occurrence, nor by th fact that others who were present did not hear or see what he stat to have been said or done.[1] Discrepancies as to minor matte rather tend to sustain the credit of witnesses, as indicating th absence of concert.[2] And the perceptive powers, as well as th capacities and opportunities for observation, of witnesses, are diverse that it is quite possible and natural that acts or wor sworn to by one witness should have escaped the notice of anoth present at the same time and place.

Affirmative and Negative Testimony. As remarked b the U. S. Supreme Court in an adjudged case:[3]—"It is a rule evidence that, ordinarily, a witness who testifies to an affirmati is entitled to credit in preference to one who testifies to a neg tive, because the latter may have forgotten what actually oc curred, whereas it is impossible to remember what never existed." Again the negative witness may not have "forgotten," but m simply have failed to perceive what has really occurred in hi presence or near him. Of two equally honest witnesses, the one from a superior faculty of discernment, or a superior opportuni for informing himself, or both, may have become cognizant o facts to which he can testify affirmatively, while the other, wh interrogated as to the same matter, can only reply that he d not see or hear, or does not know, &c.; yet each will be a truth ful witness. A witness may also have been mentally preoccupi

[1] Bogle v. Hammons, 2 Tenn. 137.

[2] See Simmons § 986; O'Brien, 221.

[3] Stitt v. Huidekopers, 17 Wallace, 384; Wharton, Cr. Ev. § 3 The testimony of a series of witnesses, for instance, that they nev saw a party drunk, does not outweigh the testimony of others to the f of his drunkenness on particular occasions, unless those speaking to negative cover the same point of time as those speaking to the affir tive. Wharton, Cr. Ev. § 382, citing Murphy v. People, 90 Ills.

ıe time of the occurrence in question; or, for fear of involv- himself or otherwise, he may have been unwilling to take :e of what was passing: in such cases also his testimony may rue, though of a negative character and of inferior relative ;ht.

estimony of the Accused. In a case of importance in :h the accused takes the stand as a witness in his own behalf, ıy be embarrassing to determine exactly how far he is to be ved. His credibility will be subject to question oftener per- for the reason that it is not natural to expect an uncolored ment from a person charged with crime, than for the reason he is believed to have wilfully stated what is false. His tes- ny will always be fair material for a rigid cross-examination, as it has been observed by the U. S. Supreme Court, "a :er latitude is undoubtedly allowable in the cross-examination party who places himself on the stand than in that of other esses."[1] How successfully he may endure this test is a cir- ıtance which will be most material in measuring his credi- ;[2] but probably the safest general rule to apply to his :nce as a whole—at least where a *prima facie* case has already made out against him by the prosecution—will be that en- :redit should not be given to his statements except in so far : is corroborated by unprejudiced witnesses or reliable writ- estimony.

umber of Witnesses. The relative number of the wit- :s for the prosecution and the defence, though a material r where the number on one side very considerably exceeds on the other, is by no means decisive in general. The rel- weight of testimony depends much less upon the number e witnesses than upon the quality of their statements. Evi- e is valuable according as it is the expression of such con-

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Rea *v.* Missouri, 17 Wallace, 542.

Some inference may perhaps also be drawn from the manner in ı his *direct* examination is conducted. Thus where a party "was ined as a witness in his own behalf, yet his counsel forbore to in- ;ate him" as to certain conduct charged against him and especially ial in the case, it was held that "the natural and irresistible infer- rom this omission was that the party was conscious of the truth of ıarge and was too honest to deny it if he had been examined con- ıg it." McCall *v.* McDowell, Deady, 243.

comitants as superior intelligence, capacity of appreciatio of observation, and opportunity for acquiring knowledg single witness in whose case these incidents concur will outweigh several less well qualified and informed witness

Manner of the Witness. That the manner of the on the stand—his appearance, demeanor, style of ex himself, &c.—is proper to be considered in connection v testimony as adding to or detracting from his credibility ative weight, is a point frequently noticed by the auth Where, for example, the bearing of a witness is such as cate that he is simply making a statement of the facts wi knowledge and observation uninfluenced by interest or feeling, his testimony will carry very considerably more than where it is apparently colored by resentment or pr or where, unconsciously perhaps to himself, he speaks as san of the side on which he is called. So a reluctant an cautious witness, or a "willing" or "fast" one, is in gene to be credited than one whose evidence is neither calcula impulsive, who is frank without being florid. So too a cl self-possessed witness will ordinarily make a better imp than an agitated or confused one. At the same time it questionable that a perfectly reliable and truthful witn not unfrequently fail to do himself justice from natural rassment or a lack of fluency, and that diffidence and he on the stand are as often characteristics of an honest as o honest witness.[3]

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1. See Sibley *v.* Ins. Co., 9 Bissell, 31; Taylor *v.* Harwood, Dec. 437; Randolph *v.* Lane, 57 Ind. 115; McCrum *v.* Corby, 1 117; G. C. M. O. 3, Dept. of the Mo., 1884; DIGEST, 254. nesses cannot be treated as units, to be divested of their own dis claims to credit. It may well happen that one intelligent and witness may outweigh several who are ignorant or unreliabl should it be forgotten that one witness, corroborated by facts o ments, may outweigh a multitude whose testimony may have b result of imperfect observation, or have been influenced by prej So it may happen that the evidence of a witness who is entirely ported may be such as properly to outweigh that of another who ments are corroborated. Canada *v.* Curry, 73 Ind. 246.

2. U. S. Cole, 5 McLean, 514; Dickenson *v.* Gore, Newber Callanan *v.* Shaw, 24 Iowa, 441; Stokes *v.* Mowatt, 1 U. S. La 325; Tytler, 262; Simmons § 573; Kennedy, 173–5; Napier, Hart, 150; G. C. M. O. 19 of 1885—Opinion of At. Gen. Brews

3. "Equally truthful men often speak in very different wa

court-martial, by reason of the superior education and intel-
nce of its members, is a species of jury peculiarly qualified
:he discriminations and comparisons necessary to be made in
mating the relative weight and credibility of oral testimonies.[1]

IV. WRITTEN TESTIMONY.

'his subject will be considered under the Titles of—I. Public
tings; II. Private Writings.

I. PUBLIC WRITINGS.

hese may be divided into—1. Judicial Records; 2. Other
lic Documents.

Judicial Records—***Records of civil tribunals.*** Rec-
of courts of the United States or of the States will rarely be
ired to be offered in evidence on military trials. Occasion,
ever, may occur for such evidence;—as where a soldier, to
rove a charge of desertion, has to show that he has been
ined in arrest by the civil authorities for some crime or dis-
r, or sentenced therefor by a civil court to a term of impris-
ent; or the prosecution in a case of desertion has to prove
a sentence and confinement, as evidence of the existence of a
nifest impediment" excepting the case from the operation of
103d Article of war;[2] or where an officer or soldier charged
re a court-martial, in time of war, with one of the offences
ified in Art. 58, has to offer in support of a plea of former
, (under Art. 102,) the record of his acquittal or conviction
civil tribunal having concurrent jurisdiction of the crime;[3] or

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same transaction, one with perfect confidence and the other with
t and hesitation. One will say—'It was,' and the other—'I think
s.' A jury is bound by neither statement, but may credit either.
* * It does not follow that a jury must credit the former in
rence to the latter." Muscott *v.* Stubbs, 24 Kansas 520, 522.

Upon the subject of the credibility of witnesses Dillon, J., in
. *v.* Babcock, 3 Dillon, 619–620, expresses himself as follows:—
e degree of credit due to a witness should be determined by his
acter and conduct; by his manner upon the stand; his relation to
controversy and to the parties; his hopes and fears; his bias or im-
tiality; the reasonableness or otherwise of the statements he makes;
strength or weakness of his recollection viewed in the light of all
other testimony, facts and circumstances in the case. And see
chberger *v.* Ins. Co., 4 Bissell, 265.

See DIGEST, 87; *In re* Davison, 4 Fed. Rep. 507.

See Chapter XVI—"Plea of Former Trial;" DIGEST, 27.

where it may be material, (as in rare cases it has been,) to j evidence a judgment of divorce, or a decree of a probate granting letters of administration.

When thus required, the records of judgments, &c., of (of the United States, (in the absence of the originals whicl rarely be attainable,) may be proved by copies under the se the court attested by the clerk. Judgments and judicial pro ings of State courts of general jurisdiction are proved by (attested by the clerk and certified by the judge, as prescrit Sec. 905, Rev. Sts.[1] Judgments, &c., of municipal cour courts of limited judicial authority such as those of justic the peace, of whose proceedings a formal record is requir law to be kept, may be proved by copies authenticated, so may be practicable, in the manner prescribed by the same st In the absence of a formal record, such judgments, &c. proved by the book containing the minutes, produced and ve by the justice or other proper custodian as a witness, or by a of the minutes authenticated according to the local law or u or, if there has been no minute or written entry made of th ceedings, by the testimony of the justice or other "comp person."[2]

These forms of proof, adopted in civil proceedings, shoul be observed in military cases, unless the parties, by *stipul* to admit the existence and substance of the record desired shown, may dispense with the usual formalities.

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1. As to judgments of courts of *foreign* countries, these, says shall C. J., in Church *v.* Hubbart, 2 Cranch, 238, are to be aut cated—"1. By an exemplification under the great seal; 2. By a proved to be a true copy," (by a witness who has compared it wit original, 1 Greenl. Ev. § 514;) "3. By the certificate of an office thorized by law, which certificate must itself be properly authentic These," he adds, "are the usual and appear to be the most prop not the only, modes of verifying foreign judgments. If they be al yond the reach of the party, other testimony inferior in its nature n be received." And see 1 Greenl. Ev. § 514; Buttrick *v.* Allen, 8 J 273; Lincoln *v.* Battelle, 6 Wend. 475. If a foreign judgment proposed to be offered in evidence before a military court, it woul desirable to procure to be appended to the record a certificate o American consul, attesting the genuineness of the signature of the ying judge or clerk, and stating that the authentication was in the form adopted for copies of records of the particular court. The might then properly be admitted without further evidence. See and *v.* Hill, 7 Cow. 434.

2. 1 Greenl. Ev. § 513.

Records of military tribunals. These, not being pos-
sed or held in the office of any court or by any *judicial* au-
rity, but being simply preserved in the War Department, or
the headquarters of military commands, are, as respects the
m of proving the same by authenticated copies, not judicial
ords but executive documents. They will therefore be in-
ded under the following head.

2. Public Documents. This second species of public writ-
s consists, mainly, of the acts of the legislative and executive
artments of government in their collective capacities, and of
official acts of the separate public functionaries, as contained
official books and papers forming the records of public trans-
ions. These may therefore be divided into: (1) Legislative
s and acts of State; such as Acts and Resolutions of Congress,
l Congressional debates and proceedings; Executive procla-
tions, orders, communications to Congress, and other acts;
l Treaties; (2) Official books and papers.

1. Legislative acts and acts of State. The public Stat-
s—Acts and Resolutions[1]—of Congress are proved as follows:
enacted prior to December 1st, 1873, they are proved by the
vised Statutes, which comprise a single Act of Congress of
ne 22, 1874, (originally published in one volume in 1875, and
which a Second Edition, that now in use, was published in
'8,) and constitute a revision and consolidation of all the exist-
public laws, (as contained in the previous seventeen volumes
"Statutes at Large,") in force on said Dec. 1, 1873,[2] with a

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. "Resolutions" are no less statutes than "Acts." Originally—
he Continental Congress—all enactments were designated as Resolu-
ns. Under the Constitution, Resolutions were first resorted to mainly
the requesting, authorizing, or directing of things to be done by
cutive officials of the government, the regulation of minor details of
blic expenditure, &c. Later, they have not unfrequently contained
islation on subjects of general importance capable of being briefly
posed of. They are now designated in their titles as "Joint Resolu-
ns," and in their publication are classed as "Public" and "Private"
solutions; the latter, with the "Private Acts," comprising the legis-
ion for the relief or benefit of individuals.

. The authority for the original revision of the statutes, and for the
blication of the same, as also for the preparation and publication of a
edition, is contained in the Acts of June 27, 1866, June 20, 1874, and
arch 2, 1877. See Appendix to Revised Statutes, pp. 1089–1092.
mpare Wright *v.* U. S., 15 Ct. Cl. 80.

very few designated exceptions.[1] If enacted since Dec. 1, 187 public statutes are proved, either by the single volume designat as the "Supplement to the Revised Statutes,"[2] made, by t Joint Resolution of June 7, 1880, "*prima facie* evidence of t laws therein contained;" or by the separate publications or v umes issued under the direction of the Secretary of State,[3] a cording to the provisions of the Act of June 20, 1874, and ma by said Act "legal evidence of the laws and treaties therein co tained."

Private statutes are proved by the printed copies of t Private Acts and Resolutions as first collected in Vol. 6 of t Statutes at Large, and further contained in each volume of tho Statutes from the 9th to the volume last published.

The public treaties are proved from the Volume contain treaties in force, required to be compiled and published by sec of the Act of June 20, 1874; and, as to those of later date, by t printed copies of the same published at the end of the volum of Statutes at Large from Vol. 18 to the last volume.

Publications of statutes in Orders. As already indicat military courts may properly take judicial notice, without furthe evidence, (in the absence of proof that they are incorrect printed,) of the Acts and Resolutions of Congress relating chie to the Army, which are published for its information in print General Orders issued from the War Department or Headquarte of the Army.

A statute of Congress, not yet published, can only b proved by a copy from the State Department, (where the origin is deposited,) authenticated under the seal of the department.

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1. These exceptions—*i. e.* the enactments ***not repealed*** by the Revis Statutes—are specified in Sec. 5596, R. S.

2. The "Supplement" embraces only statutes enacted between 18 and 1881 inclusive.

3. They are published in "pamphlet" volumes after each session Congress, and subsequently in bound volumes of Statutes at Lar These volumes, as succeeding the seventeen vols. published up to t date of the Revised Statutes, commence with Vol. 18. The last th far, (1886,) is Vol. 23.

ate or Territorial statutes are proved by the authorized ications of the same, or by copies authenticated under the of the State, &c., as prescribed in Sec. 905, Rev. Sts.[1]

he proceedings and debates of Congress are proved the publication of the same, as printed by the Public Printer, ther person with whom a contract for such printing may be orized by Congress to be made,) according to the provisions c. 78, Rev. Sts., and of the Act of January 22, 1874.[2] Simi- roceedings of the Legislatures of the States or Territories to be proved from the official journals or other authentic ications.

xecutive Proclamations, and Orders of the nature roclamations,[3] proceeding from the President, are usually ished at the end of the volumes of the Statutes at Large, and be proved therefrom, or from authenticated copies in the dy of the Secretary of State. Executive messages and com- ications to Congress, (including those from Heads of Depart- ts,) as well as other State papers ordered by it to be printed, roved from the Journals and Public Documents published by uthority of Congress.[4]

ther Executive acts. *Pardons*, where the original charter ot be produced, are shown by authenticated copies from the e Department. *Appointments*, in the absence of the original r or commission, are proved by duly authenticated copy from proper Department, or certificate of the fact as there recorded. General Orders, however, issued from the War Department

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. See an instance of a State law, published in a pamphlet, held inad- ible in evidence because not properly authenticated—in Craig *v.* wn, Peters, C. C. 352.

reign written laws are authenticated similarly to foreign judgments. note *ante.*) But foreign *unwritten* laws, customs and usages may proved by parol evidence, *viz.* by the testimony of competent per- instructed in or acquainted with the same. See 1 Greenl. Ev. § 488; rch *v.* Hubbart, 2 Cranch, 237.

The proceedings and debates of Congress are at present published e "Congressional Record," an official publication printed by the lic Printer and issued daily during each session.

See such "Executive Orders" in 13 Stats. at Large, 775–778.

See Watkins *v.* Holman, 16 Peters, 26; Bryan *v.* Forsyth, 19 ard, 334; Gregg *v.* Forsyth, 24 Id. 179.

or through the Headquarters of the Army, are properly receiv by military courts as competent evidence of all proclamations orders of the Executive, or other executive acts, which may published therein.

Acts of the Executives of the States or Territories a to be proved from authorized publications, or by copies certif by the proper official, or, if matter of public record, in the fo prescribed by Sec. 906, Rev. Sts.

2. Official Books and Papers—*of the U. S. Executi Departments.* These, where material in evidence, are provab either by the *original*, produced and sworn to by the proper of cial custodian as a witness on the stand;[1] or, where—as is usual the case—the original is not accessible, by *copy*, as provided Sec. 882, Rev. Sts., as follows:—"*Copies of any books, rec papers, or documents in any of the Executive Departments, auth ticated under the seals of such Departments, respectively, shall admitted in evidence equally with the originals thereof.*"[2]

As to the *form* of the authentication prescribed by the statut this, as it is held by the authorities, must be "strictly pursued." It has however been ruled by the Supreme Court that the *sig*

1. In Evanston *v.* Gunn, 99 U. S. 660, it was held that the origi record made by a member of the U. S. Signal Corps, of the state the weather and the direction and velocity of the wind, on a cert day, was competent evidence of the facts reported, as being in the nat of an official record kept by a public officer in the discharge of a pub duty.

2. It may be noticed here, as applicable generally under the pres head, that, independently of statute and "on general principles of la a copy given by a public officer, whose duty it is to keep the origi ought to be read in evidence." Marshall C. J., in U. S. *v.* Percher 7 Peters, 85.

It may also be remarked that where an official document (or pub record) is *lost or destroyed*, its contents, after proof of the loss or destr tion, may be proved by secondary evidence. See 1 Greenl. Ev. § 50

3. Smith *v.* U. S., 5 Peters, 302; U. S. *v.* Harrill, McAllister, 24 Pendleton *v.* U. S., 2 Brock. 75. In the last case, a copy of a let from the War Department to an army contractor was held inadmiss in evidence because not authenticated as prescribed by statute. On t trial of Capt. John Shaw of the navy, a copy of a letter from the Sec tary of the Navy to the prosecutor in the case was ruled out on the sa ground. Printed Trial, p. 34. So, copies of files of the War De ment not duly authenticated were held inadmissible on Gen. Dyer's C of Inquiry, part I, p. 7.

e of the Head of the Department is not necessary to complete authentication, the presence of the *seal* alone being required nake the transcript evidence.[1] In the practice indeed of the ır Department, the certificate of authentication has in general n attested by the signature of the Secretary of War. This tificate has commonly also been preceded by one signed by : chief of bureau, or other subordinate, who may have the mediate custody of the original, to the effect that the paper, ., is a true copy of such original in his charge. Such prelim- ry certificate, however, though convenient as assuring the retary that the copy has been correctly made out, is quite material to the legal proof required.

Copy not evidence where original necessary. It may e be noted that where the actual execution of a paper by the nature of an officer or soldier is required to be shown, the *ginal* must of course be produced in evidence, an authenti- ed copy not being sufficient. As where, for example, the used is charged with having signed a false certificate on a pay l or other voucher: here the original must be exhibited with of of handwriting.[2] An original paper on file in an executive artment or office is proved by the person in whose custody it appearing as a witness on the stand and producing and swear- to the paper as the original.

Publications authorized by statute. Where a document one of the Departments has been printed and published by the hority of statute, each printed copy is an original and proves lf.[3] Such a document is the Army Register, and it has been d by the Supreme Court[4] that this compilation is evidence of h facts "as the names of officers, date of commissions, promo- ıs, resignations, and regimental rank, brevet and other rank, he department of the army to which officers belong." But as further held that the Register could not be received as dence of the pay or emoluments of officers, the organization the army, or any other matter which was the subject of an

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1. Smith *v.* U. S., 5 Peters, 300.
2. G. C. M. O. 25 of 1875; G. O. 3, Dept. of the N. West, 1863; Do. Dept. of the South, 1864.
3. 1 Greenl. Ev. § 90.
4. Wetmore *v.* U. S., 10 Peters, 652.

express *statute* fixing and defining it. For, as it was declared, the statute itself is the best evidence of its provisions, and when these are material to the issue, the court itself must judicially expound them and not accept the construction of executive officials.[1]

General Orders, &c. The printed official copies of "General Orders" and "General Court-Martial Orders," published from the War Department or Headquarters of the Army, though not authorized by statute, carry upon their face such evidence of authenticity that they are always admitted as evidence before courts-martial, in lieu of formally authenticated written copies of the originals. In many cases indeed there are no written originals; and in all cases military courts, as has heretofore been remarked, will take judicial notice of the printed forms as genuine and correct. As to the Special Orders emanating from the same sources, while these have a much more restricted scope as publications, they are equally formal and official, and the printed copies, in the absence of any indication that they are not genuine, may safely and properly be admitted in evidence by military courts in the same manner as General Orders.[2]

The printed General and Special Orders, issued from the Headquarters of Military Divisions and Departments, may properly be regarded as similarly proving themselves and admissible.

A printed General or Special Order, to be admitted as competent evidence, should, strictly, bear the written signature of the Adjutant General, or Assistant Adjutant General, or other staff officer, below the printed word "Official" at the end of the form. This however may be dispensed with in the absence of evidence that it is not an official copy.

Proceedings of military courts. As heretofore noticed, such proceedings are not judicial records but executive documents, and, as to the form and manner of their authentication and proof, are to be classed with the other official papers on file in the Departments. The 114th Article of war, entitling persons tried by

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1. [illegible] U. S. [illegible]

2. [illegible] Special Order, required or material to be put in evidence [illegible] has not been printed or published, and exists [illegible] to be proved like any other official paper, unless admitted by consent without proof.

al court-martial to be furnished with copies of the "pro-
ngs and sentence of such court," does not do away with
f the forms required to render copies of official papers ad-
ble in evidence; nor does Art. 121, in authorizing the pro-
ngs of courts of inquiry to be used as evidence on trials
e courts-martial, affect the matter of the form of authenti-
n of copies as prescribed by Sec. 882, Rev. Sts. On mili-
rials, however, the parties may stipulate to dispense with
ll legal form. Thus, where the original cannot be pro-
l, the copy furnished from the Bureau of Military Justice
no other authentication than the endorsed attestation of the
e Advocate General to the effect that the same is a "*true*
" may be agreed to be admitted without further formality.
e parties may consent to admit any separate portion of the
edings or testimony set forth in such copy that may be
rial. Where indeed the proceedings have been promulgated
General Order, and some fact, fully appearing in such Or-
-as the finding, acquittal, sentence, or action of the review-
uthority,—is alone desired to be proved, the parties may
stipulate to admit in evidence a copy of the printed Order,
e authenticity indeed of which the court will properly take
ial notice.

ficial papers of military commands. Such are the
ls of inferior courts,[1] books, official reports, communica-
and papers, kept on file at the Headquarters of military
ions and Departments, as also the various Regimental, Com-
Post and Hospital books, &c., recognized by army regula-
or military usage. These are not public records in the
of Sec. 882, Rev. Sts., and the special provision of that
n in regard to proof by authenticated copy can hardly be
led as extending to them. Proof of the same therefore
strictly, be made by the *original*, produced and identified
e proper custodian appearing on the stand as a witness.
ilitary trials, however, *copies* of such papers, &c., or of the
ial entries in such books, attested by the proper commander
f officer, will in general properly be admitted, by the con-
f the parties and acquiescence of the court, as competent

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ow required, by Act of March 3, 1877, to be retained and filed
udge Advocate's Office at Department Headquarters.

evidence of their contents, and as such evidence be annexed to or incorporated in the record of the trial.

Where however a paper or book of this class, or indeed any official paper, sets forth acts done, &c., by an officer or soldier signing the same or referred to therein, and such acts, &c., are material evidence, and can be proved by the officer or soldier himself in person as a witness, his testimony, as being the "best evidence" of the facts, should be resorted to instead of the writing.[1] So, where it is proposed to put in evidence on a trial certain facts already deposed to by witnesses before a court-martial, board of survey, &c., the witnesses themselves must, if practicable, be introduced to testify anew before the court, the record of the court, board, &c., being secondary evidence and not admissible if the personal testimony can be obtained.[2]

Official documents and papers of State and Territorial governments. These, if matter of public record, may be proved by copy authenticated as specified in Sec. 906, Rev. Sts.; if not in such manner and form as may be prescribed by the law, or sanctioned by the judicial usage, of the State or Territory.

Legal effect, as evidence, of Public Writings. Judicial records, or copies of the same when duly authenticated, are said to import "absolute verity," so that a presumption as nearly as possible conclusive is recognized as arising in favor of their correctness. Acts of State, when authoritatively promulgated, may be said to prove themselves with a conclusiveness parallel to that of judicial acts. Not much less cogent is the presumption which is recognized in favor of public books and records, other than judicial, required by statute to be officially kept. As to other official papers, these furnish not conclusive but *prima facie* evi-

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[1] See this point noticed in G. O. 28, Dept. of the South, 1864; Do. Middle Dept., 1865; Do. 32, Dept. of the East, 1869.

[2] [illegible] 255–6; G. O. 39, Dept. of the Susquehanna, 1864. By a [illegible] provision, however, of Art. 121, the proceedings of a court [illegible] may be admitted in evidence upon a trial by court-martial [illegible] So, the rule as stated in the text may be departed from [illegible] of parties, with the acquiescence of the court; indeed the [illegible] of a witness, (who has been subjected to cross-examination [illegible] trial and investigation, may sometimes constitute not only [illegible] convenient but the most desirable form of presenting the fa[illegible]

ence only of the facts therein stated,[1]—evidence which is more r less strong in proportion to the formality, public consequence, id legal sanction attaching to the writing, but is always subject ı be rebutted.

But such papers, whether originals or authenticated copies, are ıidence only as to the matter of their contents; however formal ıd authoritative *per se*, they prove or import nothing beyond emselves. Thus it has been held that the mere production in ıidence of a formal written order or notice from the War Department, addressed to an officer, did not afford any legal inference at it was received by him or even mailed to his proper station.[2] ıe point is illustrated by the entries of *charges* against soldiers the report books, muster-rolls, &c., of companies: though these tries are formal acts, they import only that the *charges* have en made, furnishing no evidence whatever as to the commis-ın of the *offences*.[3]

So, an official certificate is evidence only of facts therein stated ıich the officer was *authorized* to certify.[4] And of all official ıtements, as well as of public records, it is to be remarked *gen-ally* that if they contain matter not within the province or offi-ıl cognizance of the subscribing officer, they are, as to such ıtter, *extra-official* and not admissible as evidence.[5]

Restriction on the use in evidence of official docu-ents and papers. As has already been noticed, the docu-ents and papers of the Executive departments and officers of e Government are not in general public records open to inspec-ın by any citizen, but confidential archives in the legal custody the Head of the Department. And it has uniformly been held

1. Parish *v.* U. S., 2 Ct. Cl. 341; Hart *v.* U. S., 15 Id. 414; Chapman ›wnship *v.* Herrold, 58 Pa. St. 106.

2. G. C. M. O. 25 of 1875.

3. DIGEST, 222, 256; G. O. 33, Dept. of the Mo., 1875; G. C. M. O. , Dept. of Texas, 1876; Do. 22, Dept. of the East, 1882. So, in Han-n *v.* S. Scituate, 115 Mass. 336, an authenticated copy of an extract ›m a muster-roll on file in the War Department, in which it was stated at a soldier had deserted, was held not to constitute legal evidence of ch desertion, such statement being in fact a *charge* only.

4. Levy *v.* Burley, 2 Sumner, 358, (Story J.) And see Owings *v.* Hull, Peters, 624–6; U. S. *v.* Wiggins, 14 Id. 346; U. S. *v.* Delespine, 15 226; White *v.* Burnley, 20 Howard, 235.

5. See 1 Greenl. Ev. § 491; U. S. *v.* Jones, 8 Peters, 375, 388; Wet-ıre *v.* U. S., 10 Id. 652.

that this official may decline to allow copies of such papers to b made or authenticated for use in evidence before the cour when, in his opinion, considerations of public policy or justi render it inexpedient that their contents should be made publi This course, (subject to the provisions of Arts. 114 and 121,) m be pursued with military charges, or records of military inve gations, equally as with other official communications and doc ments.[2] So, as to official reports and communications addre to him, or other confidential papers on file at his Headquarter Commander of a military Division or Department is properly be regarded as invested with an authority analogous to that the Head of the Executive Department whom he represent The corresponding officials of a State or Territory possess a di cretion in this respect similar to that ascribed to the superi federal officers indicated.

II. Private Writings.

As Testimony in Military Cases. The term "Private Wr ings," as employed in the works on Evidence, has especial ref ence to contracts, deeds, and other personal written instrume and obligations. In the military practice, writings of this ch acter are not often required to be put in evidence on trials. may sometimes indeed be necessary or material to introduce suc writings as contracts of enlistment, contracts between office representing the government and civil contractors, or offic bonds of disbursing officers; but these in general will have be come part of the official papers of the War or other Executiv Department, and so provable by the original or a copy procure therefrom in the manner and form already indicated under th foregoing Title. Upon a charge also of unbecoming conduct the dishonorable non-payment of a debt, it may be found materi to prove the execution of a promissory note, check, or bill of ex change. More commonly, however, the class of private writing which come to be the basis of military charges or are required

1. 1 Greenl. Ev. § 250, 251, 476; Wharton, Cr. Ev. § 513; Clode M. L., 147–8; and authorities cited in note under the head of "Evi dence excluded from considerations of public policy," p. 468, *ante*.

2. See Home *v.* Ld. Bentinck, 5 Brod. & Bing. 130; Dawkins *v.* L Paulet, 5 Q. B. 94; Dawkins *v.* Ld. Rokeby, 8 Id. 255; Dickson Earl of Wilton, 1 Fost. & Fin. 419. But see XI Opins. At. Gen. 137.

3. See G. O. 25, Dept. of the Mo., 1867.

ut in evidence on military trials are communications or state-
its written or caused to be written by the authors, (or pub-
ed in newspapers or pamphlets,) containing false charges or
espectful language, or which are otherwise unauthorized or
roper and prejudicial to military discipline. With these may
enumerated, as special instances, written challenges sent or
epted in violation of Art. 26, communications made to an en-
y in violation of Art. 46, letters or telegrams sent by offenders
nterested persons and illustrating their *intent*, &c.

he general rules already set forth as to the introduction and
ission of evidence apply to writings of this class in common
h other proofs; and it will be necessary to consider here but
points, as follows:—

roof of Genuineness and Identity. The writing pro-
ed to be proved must be produced in court and identified by
proper witness or witnesses as having been actually sent,[1]
ived, written, published, &c.[2] If it is a writing specifically
rred to in the charges, the paper produced must appear to
respond in terms or substance with that thus set forth or de-
bed.[3] If it be indefinite, obscure, or incomplete *per se*, it
be explained, elucidated, or completed by other testimony.
where expressed in a foreign language, it may be translated
competent witness. But where it consists of a deliberate
nal instrument, as an express contract, it cannot be varied or
tradicted by parol evidence.[4]

f the writing produced is a *copy*, it must be shown to be a true
uscript by one who has compared it with the original, and the
inal must be shown to have been genuine and to be lost or
troyed.[5] Where the fact to be proved is the mere receipt of a
gram, the copy identified as that actually received may ordi-

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A postmark on a letter is presumptive evidence that it has been
ed. U. S. *v.* Noelke, 17 Blatchford, 555.

See Stroud *v.* Springfield, 28 Texas, 649; Renn *v.* Sands, 33 Texas,

G. C. M. O. 64, Dept. of the Mo., 1881.

1 Greenl. Ev. § 275; Hunt *v.* Rousmanier, 8 Wheaton, 211; Emer-
v. Slater, 22 Howard, 41; Findley *v.* Bk. of U. S., 2 McLean, 57;
ible *v.* Lull, 3 Id. 272.

McGinnis *v.* Sawyer, 63 Pa. St. 259; Krise *v.* Neason, 66 Id. 253;
iburg *v.* Callanan, 14 Iowa, 251. A copy of a copy is not admissi-
Maurice *v.* Worden, 54 Md. 233.

narily be admitted in evidence on a military trial; but if necessary that the original should be proved in order to show that certain form of words was actually sent, or that the message sent was different from the copy received, or was signed by or the handwriting of the accused or other person, the operator other proper official must be summoned and required to produce such original, (which is not a privileged communication,) and the same must be clearly identified by his or other testimony.[1]

Proof of Handwriting. Where it is necessary to prove that a writing proposed to be put in evidence was written or signed by the accused or other person, and this cannot be shown by the party who wrote or signed it, (as where he was the accused himself,) or by a subscribing witness, (the paper not having been formally witnessed, or the witness being dead or not attainable,) the same is properly established either—(1) by the testimony of witnesses having personal knowledge of the handwriting;[3] or by a comparison of writings, made—in a military case—by the court.

1. By witnesses having knowledge.[4] Such knowledge it is held, must have been acquired in one of two ways. The witness must (1) either have seen the individual write,[5]—and

1. See Wharton, Law of Ev. § 76, 1128; Id., Cr. Ev. § 645; Wood v. Miller, 55 Iowa, 168; DIGEST, 257.

2. If there is a subscribing witness to the paper, he must be called if he can be reached and is legally competent. Kinney v. Flynn, 2 R. 319; 1 Greenl. Ev. § 569.

3. "In regard to the term 'handwriting,' we think that it should include, generally, whatever the party has written with his hand, and not merely his common and usual style of chirography." Shaw C. J., Com. v. Webster, 5 Cush. 301.

4. In Goodhue v. Bartlett, 5 McLean, 186, it was held, (following Moody v. Rowell, 17 Pick. 490,) that it was sufficient for the witness to swear affirmatively as to the handwriting, without stating how he knew it to be that of the party, leaving it to the other side, on cross-examination, to question as to the sources of his knowledge. In practice, however, the witness is generally called upon to state the grounds of his knowledge on the direct examination.

5. Hopkins v. Simmons, 1 Cranch, C. 250; U. S. v. Larned, 4 Id. 3[illegible]; Hopkins v. Megguire, 35 Maine, 78; Lyon v. Lyman, 9 Conn. 55; Ke[illegible] v. Lothrop, 10 Cush. 453; Bingham v. Peters, 1 Gray, 145; People v. [illegible], 1 Denio, 343; State v. Allen, 1 Hawks, 8. "To identify his writing, the oath of the writer, or his admission if produced against him, is the best evidence; then the testimony of persons who saw the writing

ot essential that he should be familiar with his writing, for evidence is admissible, for what it is worth, if he has seen the ty write but once and then only his name;[1] or (2) he must e seen letters or other writings purporting to be in his handting and have been in some manner satisfied that they were tten by him,—as by having corresponded with him on the is of them, or having taken action upon them which he has uiesced in, or by the fact, known to the witness, of the person nself having otherwise adopted and acted upon such writings business or official transactions, &c., as his own.[2]

This, as has already been noticed, is one of the few exceptional es in which a witness may be permitted to declare his opinion belief. And in arriving at the opinion that the writing or signure in question is or not that of the accused, or other alleged son, "the test of genuineness," as is observed by the court an English case,[3] "ought to be the resemblance, not to the nation of the letters in some other specimen or specimens, the general character of writing which is impressed on it as involuntary and unconscious result of constitution, habit, or er permanent cause, and is therefore itself permanent."

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tally written, or of persons who, from a knowledge of the writer, and n having seen him write, are acquainted with his handwriting." mons § 1041. But where the knowledge of the handwriting had n obtained by the witness from seeing the party write his name "for purpose of showing to the witness his true manner of writing it," and r the commencement of the suit, the evidence was held inadmissible. anger *v.* Searle, 1 Esp. 15. In George *v.* Surrey, 1 M. & Malk. 516, as held that the genuineness of a person's *mark* might be testified to a witness who had seen him make it on several occasions.

- 1 Greenl. Ev. § 577; 2 Bishop, C. P. § 432 *a*; Bowman *v.* Sanm, 5 Foster, 110; Fulton *v.* Hood, 34 Penn. 371; Cross *v.* People, Ills. 153; Simmons § 1041.

- Doe *v.* Suckermore, 5 Ad. & El. 705; Hammond's Case, 2 Greenl. 35; Page *v.* Homans, 2 Shep. 478; Withee *v.* Rowe, 45 Maine, 580; wman *v.* Sanborn, 5 Foster, 110; Moody *v.* Rowell, 17 Pick. 494; n. *v.* Webster, 5 Cush. 295; Brigham *v.* Peters, 1 Gray, 145; Kin- *v.* Flynn, 2 R. I. 319; Lyon *v.* Lyman, 9 Conn. 59; Titford *v.* Knott, ohns. Cas. 211; Johnson *v.* Daverne, 19 Johns. 134; People *v.* oner, 1 Denio, 344; Travis *v.* Brown 43 Pa. St. 9; Pope *v.* Askew, e. 20; McKonkey *v.* Gaylord, 1 Jones L. 96; State *v.* Allen, Hawks, o. Ex. Co. *v.* Thornton, 41 Miss. 216; 1 Greenl. Ev. § 577; 2 Bishop, . § 432 *a*; Wharton, Cr. Ev. § 552. It is not essential that the wit- s should have ever seen the party write or have corresponded with . Rogers *v.* Ritler, 12 Wallace, 317.

Coleridge J., in Doe *v.* Suckermore, *ante*.

2. By comparison—with other writings in evide
The evidence last indicated is, indeed, "in its nature, comp son," the belief of the witness being derived from "compar the writing in question with its exemplar in his mind deri from some previous knowledge."[1] The *comparison* now to considered, however, is that which is technically known as sm *viz.* comparison by written "standards." By the weight of thority in this country, and until recently in England, proof handwriting by such comparison has not been sanctioned ex where there are already in the case, as evidence for some ot purpose, other writings, proved or admitted to be genuine, of t individual whose handwriting is in question. In such a case genuineness of the particular writing or signature in dispute been allowed to be determined or tested by a comparison of t same with such other writings as standards.[2] Such comparis made by the jury in civil cases, would in military cases of co be made by the court. To assist in the comparison, and in determining of the question of genuineness, the evidence of e perts, *pro* and *contra*, may—it is held—be introduced by t parties.[3] The expert,—who need have had no previous kno edge of the person's handwriting,[4]—may express his opin upon such points as whether the signature is genuine or s

1. 1 Greenl. Ev. § 577; Travis *v.* Brown, 43 Pa. St. 9.

2. Moore *v.* U. S., 91 U. S. 270; U. S. *v.* Chamberlain, 12 Blatchf 390; Medway *v.* U. S., 6 Ct. Cl. 421; also 1 Greenl. Ev. § 578; Wharto Cr. Ev. § 556; 2 Bishop, C. P. § 432 *b*, and cases cited.

3. 1. Greenl. Ev. § 578; Wharton, Cr. Ev. § 559, 560; 2 Bishop, P. § 432 *c*, and cases cited. The experts usually resorted to appear have been cashiers, tellers, or clerks of banks; (see Moody *v.* Rowe 17 Pick. 490; Lyon *v.* Lyman, 9 Conn. 59;) or persons employed banks or public offices to detect forgeries; (see Goodtitle *v.* Braham Term, 497; Cooper *v.* Bockett, 4 Moore P. C. Cas. 433; Doe *v.* Such more, 5 Ad. & El. 703; People *v.* Spooner, 1 Denio, 344; Lodge Phipher, 11 Sergt. & Rawle, 336.) In Goodtitle *v.* Braham, and Ki *v.* Cator, 4 Esp. 117, the expert was an inspector or clerk of the P Office accustomed to inspect franks for the detection of forgeries. Cooper *v.* Bockett, the expert had "been in the habit of examining comparing writings, and so employed by the Bank of England for e years and upwards." In Moody *v.* Rowell the expert had been a writ teacher "for more than forty years." In Doe *v.* Suckermore, a "writi engraver" was used as an expert. In the case of Cadet Whittaker, most of the witnesses introduced (on both sides) to assist in the com ison were so-called "professional experts in handwriting."

4. King *v.* Cator, 4 Esp. 144; Nelson *v.* Johnson, 18 Ind. 329.

:ed,[1] whether the writing of the paper is in a real or feigned .d,[2] whether the signature and the body of the paper were tten by the same person, whether the whole of the paper was tten by the same individual and at the same time,[3] whether a : or amount has been altered by the substitution of one figure another,[4] &c.; and he may state in full his reasons for his clusions.[5]

t appears, however, to be the sentiment of the authorities that testimony of experts as to handwriting is not in general of :ry satisfactory character. "No great reliance," says Bishop, ıould be placed on their evidence."[6] Such as it is, however, allowed to go to the jury, (or, in military cases, to be consid- l by the court,) for whatever it may be worth.

Vith any genuine writings. The above exception to the common-law rule as to proof of handwriting by comparison recently been extended in England by a statute of 1865,[7] by

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See King *v.* Cator, *ante;* Withee *v.* Rowe, 45 Maine, 519; People ›pooner, 1 Denio, 343.

. Lyon *v.* Lyman, 9 Conn. 55. In Keith *v.* Lothrop, 10 Cush. 455, expert, on comparing the writing in dispute with "acknowledged ›roved specimens" of the handwriting of the party, gave it as his ıion, that the handwriting of the former was not genuine but artifi- —"that it was a simulated, stiff, and imitative hand, and not a free natural one." And see Moody *v.* Rowell, 17 Pick. 495. In Com. Vebster, 5 Cush. 295, it was decided that—"On a criminal trial an :rt in handwriting may testify whether, in his opinion, anonymous :rs written in a disguised hand, and calculated to divert suspicion ı the defendant, are in the defendant's handwriting."

Fulton *v.* Hood, 34 Pa. St. 370. And see Goodtitle *v.* Braham, :rm, 497; U. S. *v.* Darnaud, 3 Wallace Jr. 183; Wharton, Cr. Ev. § In Cooper *v.* Bockett, 4 Moore P. C. Cas. 433, it was ruled that re one writing crossed another, an expert might testify which, in his ıion, was the first written.

Nelson *v.* Johnson, 18 Ind. 329.

Keith *v.* Lothrop, 10 Cush. 455; Com. *v.* Webster, 5 Id. 295; 2 ›op, C. P. § 432 *c.*

2 C. P. § 432 *c.* And see Wharton, Cr. Ev. § 9, 420; Doe *v.* Suck- ›re, 5 Ad. & El. 751; The Tracy Peerage, 10 Cl. & Fin. 154; People pooner, 1 Denio, 343; Borland *v.* Walrath, 33 Iowa, 130; Cowan *v.* l, 1 McArthur, 274. On the trial of Cadet Whittaker, (*post,*) much ıe elaborate *expert* testimony, though illustrated by magnified repre- ıtions and photographic impressions, was fanciful, unsubstantial, and ight value.

"Lord Denman's Act"—28 Vict., c. 18, s. 8.

which the comparison is now allowed to be made with any oth writings whatever, although not in the case and in fact qu irrelevant and inadmissible in evidence therein for any oth purpose, *provided* they are first shown, to the satisfaction of th court, to be *genuine* writings or signatures of the person who handwriting is in question.[1] The law—in the absence of a statutory provision—has been similarly held by the courts i several of the United States;—as in Massachusetts,[2] Maine,[3] Ne Hampshire,[4] Vermont,[5] Connecticut,[6] Ohio,[7] Pennsylvani South Carolina,[9] and Mississippi.[10] In the majority of the State however, evidence of this character is still held inadmissible, and a similar view appears to be favored by the U. S. courts. In the leading military case of Cadet Whittaker,[13] tried by ge eral court-martial at West Point in 1881, the court, against th objection of the accused, admitted writings of his, not previous in the case but testified to be genuine, as standards of comparis with a disputed writing which was the basis of one of the charge In an opinion of March 17, 1882, this ruling was held by Att Gen. Brewster to be erroneous, as being opposed to the commo

1. See Cobbett *v.* Kilminster, 4 Fost. & Fin. 490; Taylor on Ev 1587; Wharton, Cr. Ev. § 555, note; 2 Bishop, C. P. § 432 *b*.

2. Moody *v.* Rowell, 17 Pick. 490.

3. Chandler *v.* Le Barron, 45 Maine, 534.

4. State *v.* Hastings, 53 N. H. 452.

5. Adams *v.* Field, 21 Vt. 256; State *v.* Ward, 39 Id. 226.

6. Lyon *v.* Lyman, 9 Conn. 55.

7. Calkins *v.* State, 14 Ohio St. 222; Bragg *v.* Colwell, 19 Id. 407.

8. Travis *v.* Brown, 43 Pa. St. 9.

9. Robertson *v.* Miller, 1 McMull. 120.

10. Wilson *v.* Beauchamp, 50 Miss. 24. So, in a tenth State, Iowa under a *statute*. Baker *v.* Mygatt, 14 Iowa, 131. And see further, i this connection, 2 Bishop, C. P. § 432 *b*; Wharton, Cr. Ev. § 557.

11. See cases cited in opinion of Atty. Gen., *post*.

12. See U. S. *v.* Craig, 4 Washington, 729; Strother *v.* Lucas, 6 Pe ters, 763; U. S. *v.* Chamberlain, 12 Blatchford, 390; Moore *v.* U. S. 91 U. S. 270; Medway *v.* U. S., 6 Ct. Cl. 429. The precise point, th the evidence in question is inadmissible, is not positively ruled in any these cases: that such, indeed, would have been held, if necessary, is t be inferred. In U. S. *v.* Craig, however, the court, though recogniz the common-law rule, adds that it "never was well satisfied with th reason" of the same.

13. The proceedings are published in G. C. M. O. 18 of March 22, 18

ɔctrine, and the sentence advised to be "set aside."[1] This ɔn having been concurred in by the President,[2] the proceed- ınd sentence were disapproved accordingly, on the ground s objection alone, and one of the most extended and labor- ınvestigations by court-martial ever held in this country ɛame to naught.

the opinion of the author this conclusion is not an entirely ıctory one. The main objections to using, as standards of arison, writings not already in the case as evidence are, that is danger that the same may be deliberately selected from ass of the correspondence, &c., of the party as the speci- most favorable for the purpose, and may not therefore fairly ent his average handwriting; and further that their intro- ɔn may open the door to collateral issues. These objections with more force to a comparison by a jury than to one upon a military trial.

ɔurt-martial composed of educated and intelligent officers army, representing the functions of both jury and judge, t is believed, safely be trusted, *where other sufficient means anting*, to depart from the strict common-law rule and ıtself, in its discretion, of the method authorized by the n and enlightened English statute and sanctioned by the ɛe of a portion of our own courts. In view of the diversity ıority on the subject, such a court, in allowing itself to be ɜted, cannot—it is submitted—properly be viewed as taking al"[3] action, when the course pursued will apparently work ıstice while conducing to a more complete investigation truth.

ɪclusion. In concluding, (as in beginning,) this Chapter, be stated, as the view of the author, that while a military ;hould, in general, as the wisest, safest and fairest proceed- ɔserve the well-established rules of evidence, yet where the

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n incorrect term as applied to action in a military case. *Disap-* would have been the proper one, and is that used in the Order.

ɜe G. C. M. O. 18 of 1882.

he Attorney General, in his opinion, refers to the conviction in ker's Case as "illegally obtained." The term is not a proper ıce the error of the Court, if it *was* an error, while it might have l a *disapproval* of the proceedings and sentence, was not such as to fected their *legal validity*.

rule pertaining to a particular subject is unsettled, or where so technical or antiquated as to restrict or embarrass a thor investigation, the court may and should, in its discretion, a such course in regard to the reception and employment of t mony as justice—justice to the United States as well as tc accused—may appear to dictate.

CHAPTER XIX.

THE FINDING.

'he Trial having been completed, and the arguments or state-
ıts, if any are made, being concluded, the court proceeds—
general without any adjournment if the legal hours of ses-
ı have not elapsed—at once to its Judgment, which consists
:he Finding and Sentence.[1] If indeed the case is one in
ch considerable evidence has been taken and the judge advo-
: has not been enabled to bring up his record, the court may
ts discretion adjourn to afford him time for the purpose. So
ny case of importance, it may properly take an adjournment
ıre entering upon the responsible duty of the Finding.
'he subject of the Finding will be considered under the heads
·I. Mode and Rules of Procedure; II. Forms of Findings;
Additions to the Finding.

I. MODE AND RULES OF PROCEDURE.

learing. The presiding officer forthwith announces that the
:t will be cleared for deliberation upon its findings; whereupon
ısed, counsel, clerks, reporters, guards, witnesses, spectators,
all other persons present, withdraw, leaving only the judge
ocate with the court; and the doors are then closed—as indi-
:d in Chapter XVII.

)eliberation. Before voting, the court, if deemed desirable,
y have the entire evidence read over to it by the judge advo-
e from the record. Commonly, however, it is found sufficient

. If, after the evidence, or the evidence of the prosecution, is all in,
accused escapes from military custody and absconds, the court may
ceed to judgment in the usual manner notwithstanding. See Trial
Military Commission of H. H. Dodd, Indiana, 1864; and compare
ht *v.* State, 7 Ohio, 180; McCorkle *v.* State, 14 Ind. 39; State *v.*
mire, 16 Id. 357.

to refer to the different portions of the testimony from time time, as the members may desire to refresh their recollection to particular facts.

Prior to the voting, discussion as to the merits of the cas sometimes engaged in by the members, but as such discussion this point, may perhaps exert an undesirable influence upon views of the junior members, it is in general the preferable cou in order that all opinions may be as independent as possible, reserve debate till the taking of a *vote* shall disclose differen necessary to be harmonized before a legal finding can be rived at.[1]

When discussion is had, it may be informal, but should be fr frank and open.[2] Here, as in all other deliberations of the co the principle of the perfect equality of the members should observed, and a junior officer in rank or age be conceded the sa right to declare his views as a senior. So, whatever opinions views are expressed should be expressed to all—laid before t court. As is remarked by Bishop[3] with regard to jurors—" they do not spontaneously agree, they should confer togeth each speaking in the hearing of all, not in clusters of two or th privately. Each should give due weight to the opinions of t others, but not concur in that to which he cannot bring his o judgment to consent."

Adjournment Pending Deliberation. In case of a point difference of opinion—as where, there being an even number members, the vote upon a charge or specification is found to be tie—a more extended deliberation may be considered desirabl and in such a case the court may adjourn and separate, to allo an interval for rest and reflection, or to enable the judge adv cate or members to consult legal authorities or military prec dents. Upon such an adjournment the members should not course allow themselves to converse with or receive communic tions from other officers or persons in reference to the case un investigation. Making a personal communication to a *jurym* "is an indictable offence when such communication touches th subject matter of the trial, or it may be treated as a contempt o

1. See McNaghten, 115, and *post* under " Provision of Art. 95."
2. See Tytler, 311; Kennedy, 182; Macomb, 58; De Hart, 174.
3. 1 C. P. § 998 *a*.

ırt."[1] So, "it is a misdemeanor in a juryman knowingly to mit such communications."[2]

Disagreement. A deliberation need not of course be conued where, after repeated votes or comparison of views, the ference is found to be *irreconcilable*. In such a case the court, lieu of coming to a formal finding, can only enter upon the ord the fact that they are wholly unable to agree, and thus minate the proceeding subject to the action of the reviewing hority.

Recalling Witnesses. It is held by Simmons[3] that the court, ring its final deliberation, may, to assist its conclusions, "re-l a witness for the purpose of putting any particular question med essential." He adds—"The parties must necessarily be sent, and cannot be refused permission to cross-examine or examine the witness to the extent of the question proposed by court. The prisoner moreover must have the fullest oppority of meeting the evidence." This view is repeated by some sequent writers.[4] Such course, however, has been most rarely rsued in our practice, and would now, if resorted to, be rerded as an exceptional irregularity. It need hardly be remarked ıt the material evidence in the case should, properly, be so ly and clearly set forth in the record of that part of the trial which it was introduced as to render such a proceeding quite necessary.

The Voting. This may be *viva voce*, but is commonly and eferably conducted by written, unsigned, ballots. The votes—ually collected by the judge advocate—are taken, first upon the ecification and then upon the charge, or, when there are sevl specifications, upon the same in order beginning with the st, and lastly upon the charge. Where there are several charges, same proceeding is had as to each of the charges and its speciation or specifications, separately, in the order of their number.

The Finding to be Complete. In military law a *general dict*, (on all the charges, &c., together,) cannot properly be

. Wharton, C. P. & P. § 729. And see 1 Bishop, C. P. § 996.
. Wharton, C. P. & P. § 721.
. Courts-Martial § 613.
O'Brien, 264; De Hart, 174.

rendered; there must be, in fact and of record, a separate and independent formal finding upon each specification and each charge.[1] And where exceptions and substitutions are made,[2] the accused must be acquitted or convicted on every part—every averment and particular—of each specification and charge.[3] "The verdict," says Bishop,[4] "should be a complete finding in due form upon the whole issue and all the issues." Such a finding indeed is necessary not only to perfect the judgment, but to protect the accused against a second trial for any of the offences set forth in the pleadings.

Where the charge is a *joint* one, there must similarly be separate and distinct votings and findings as to each of the joint accused.

Provision of Art. 95. It is provided by the 95th Article of war that—"*Members of a court-martial, in giving their votes shall begin with the youngest in commission.*" Accordingly the judge advocate, in taking a vote, calls first upon the junior member, then upon the next senior, and so on to the president. This provision—one of the oldest in our military law[5]—was enacted no doubt upon the theory that the voting would be *viva voce* and open, and the reason which has been assigned for it is that the junior members, if required to vote first, will be less liable to be influenced by the opinions of their seniors. Where however the voting, as it more usually is at this stage, is by written ballot, the reason of the statute scarcely applies: it is rather as to the voting upon interlocutory questions that the rule is important to be observed.

Every Member Must Vote. All the members must join in the finding upon every charge and specification. A failure to vote would be a neglect of the duty impliedly enjoined by the order detailing the member upon the court, and also a violation in substance of his oath in which he swore 'well and truly to try

1. Simmons § 620; Kennedy, 185.
2. See *post*—"Partial Findings."
3. That the findings must "*exhaust*" the specifications and charges; see McNaghten, 195; O'Brien, 264; De Hart, 180; DIGEST, 262, &c.
4. 1 C. P. § 1004.
5. It appears in the Code of Articles of James II, (1688.)

determine;' and would thus constitute a military offence hin the description of Art. 62.[1]

he Finding Must be According to the Evidence. The es of the members must be based upon and governed by the timony in the case considered in connection with the plea.[2] e member swears to "well and truly try and determine *accord- to the evidence*," and if he allows his vote to be controlled by ts known to himself or communicated to him by another mem-, but not in evidence,[3] or by his personal notions, prejudices feelings, he is chargeable with a dereliction of duty. He uld also take into consideration *all* the testimony, for he is at liberty to disregard the statements of any witness not seri- ly impeached or shown to have perjured himself.[4] And, in so ıg, he may measure the relative weight and credibility of the ıesses not only by the substance and quality of their evidence by their appearance and manner on the stand under the di- and the cross examination.[5]

/hile all matter of legal *excuse* will justly affect the findings, quite otherwise with matter of *extenuation*.[6] Such matter legitimately be considered only in connection with the *sen- e*, (where the punishment is discretionary,) or as a basis for a ımmendation to clemency; or more properly by the reviewing ıority in taking action upon the proceedings.

he court cannot in general properly base its finding, in the

Clode, M. L., 150. Further, the *accused* is *entitled* to have each ıber vote. Griffiths, 167–8.

Simmons § 625; Kennedy, 184; O'Brien, 241, 263; DIGEST, 262. "Statements by one juror to the rest of what he knows of the case ld not be made or received, and if acted on they will furnish nd for a new trial." 1 Bishop, C. P. § 998 *a*. "The juror may that general knowledge which any man may bring to the subject, f he has a particular knowledge," (as of an expert or *quasi* expert ıcter,) "he ought to be sworn and examined as a witness." Rex osser, 7 C. & P. 648. That a court-martial may not allow its ıg to be influenced by facts within the knowledge of individual bers, but not in evidence, see G. O. 21, Dept. of the Ohio, 1866; ıo, Dept. of the South, 1866; G. C. M. O. 41, Dept. of Texas, 1874; 3, Dept. of Arizona, 1874; DIGEST, 68.

Evans *v.* George, 80 Ills. 51.

DIGEST, 266. And see Chapter XVIII—"Number of Wit- ;,"—"Manner of the Witness," and notes.

G. O. 4 of 1843—remarks of Hon. J. C. Spencer, Secretary of War.

absence of testimony, upon admissions of the accused in his statement; the same not being evidence.[1]

Chance or Compromise Verdict. The voting must consist in an expression of the individual opinions of the members. A resort to *casting lots*, or other expedient by which the judgment is determined by *chance*, is grossly irregular, and, where known to have occurred, would properly induce a disapproval of the finding.[2] So, a "compromise verdict" is objectionable and improper, except where the result of an honest modification of individual views, and the expression of a matured opinion.[3] The effect of compromise however is a point more apposite to the subject of the *sentence* than to that of the finding.

Majority Rule. Upon the finding, as elsewhere in the proceedings, the result is determined by a majority of the votes. If, for example, three members of a court of five vote Guilty on any charge or specification, the accused is legally convicted thereon. If—there being an even number of members—the vote is a tie, the accused is strictly neither convicted nor acquitted; but as he is certainly not convicted, the vote inures to his benefit and is equivalent to an acquittal, and the finding is entered on the record as Not Guilty.[4]

In capital cases. It has sometimes been supposed that a finding of Guilty of an offence for which the death penalty was prescribed must, to be valid, be made by a two-thirds vote, but this is a misconception.[5] The 96th Article of war—the only law on the subject—simply requires a concurrence of two thirds of the members to sustain a death *sentence*. In the case of the *finding* a majority governs whatever be the character of the sentence.

1. See G. C. M. O. 179, Dept. of Dakota, 1883.

2. See Delafons, 148. In the civil procedure, "any device by which the verdict is in any degree determined by chance is illegal and renders it void." 1 Bishop, C. P., 998 *a*. Such a finding is in general ground for ordering a new trial. Wharton, C. P. & P. § 732, 842.

3. Compare Wharton, C. P. & P. § 842.

4. Simmons § 616; Hughes, 85; Prendergast, 210; De Hart, 180; Coppée, 83; G. C. M. O. 17 of 1871; Do. 1 of 1872; Do. 38, Dept. of the Platte, 1868; DIGEST, 266, 479. To the same effect was the maxim of the Roman law—"*Paribus sententus reus absolvitur.*"

5. DIGEST, 78–9.

›rity being equally sufficient to sustain a capital sen-
›entence imposing a slight penalty.

ation of Finding. A finding once made may be
a subsequent session of the court before the final con-
he proceedings in the case. For example, where the
a finding of conviction, has adjourned before taking
tter of the sentence, it may, on reassembling, decide
›nsider its finding and may thereupon change it en-
›tituting an acquittal for a conviction or *vice versa*,[1])
t in any part.

ıdling an Act of the Court—Protest. In the
finally made and recorded, whatever they may be and
ıall may be the majority by which they were arrived
:t acts as a *unit*. In law the finding is its act, not the
in members.[2] So, neither the majority, nor any mem-
nber can protest against a finding after it has been
a majority vote. No protest can be permitted to be
the record; nor can a member or members address a
›otest to the commanding general or other superior
vithout being chargeable with a grave irregularity.[3]
se where the president of a court-martial added to the
claration to the effect that he disagreed with the ma-
finding of Guilty, stating his reasons,—his action was
sapproved by the reviewing commander.[4]

ing the Votes. There existed at one time some
›f opinion among the authorities as to whether or not
ballots cast by the members of the court, in voting
ıding, (or sentence,) should be preserved or some per-
ıute of the same retained.[5] The better conclusion
ed that, in view of the provisions of Arts. 84 and 85

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ase of a substitution of a conviction for an acquittal cited in

ly, 205; De Hart, 187.

ns § 469; Hough, (P.) 703; G. O. 19, Dept. of the Caro-
DIGEST, 400.

I. O. 24, Dept. of the Platte, 1875.

favoring the preserving of the votes, (or an abstract of the
:e, 224; 1 McArthur, 323; Delafons, 274; De Hart, 177:
ımons § 614; Kennedy, 237; Griffiths, 176; Benét, 127.

against the disclosure of the votes and opinions of the member it is preferable to destroy the ballots, since otherwise they mig fall into the hands of improper persons.[1] A further and sufficie reason for this course is that they are *no part of the record* of th court. It is therefore the duty neither of the court nor the jud advocate to retain them, and the court could scarcely require th judge advocate to preserve them or a minute of them. Th almost universal practice is now believed to be to destroy the at the conclusion of the proceedings with the other waste pape made on the trial.

The Findings Must be Certain. That is to say they mu have no uncertain meaning but must be intelligible and exac This will be illustrated in treating presently of the various allow able *forms* of finding.

The Findings Must be Consistent and Harmonio That is to say the finding on the charge must be responsive that on the specification or specifications,[3] and the findings both must be consistent and in harmony with each other; el they will be legally defective and will not support a sentence Incongruous findings in general defeat each other—as will al be illustrated under the next head.

II. FORMS OF FINDINGS.

Finding of Guilty or Not Guilty. The simplest and most usual form of military verdict is where the accused is foun "Guilty"[5] or "Not Guilty" of both the charge and the specifi cation. Here the findings are consistent and harmonious, an the finding on the charge is supported by that on the specifica

1. Simmons § 614. Kennedy, who was Judge Advocate General of the Bombay Army, writes, (p. 237,)—"For my own part, from the first to the last general court-martial at which I officiated as judge advocate, I made it a point, as soon as the proceedings were confirmed, to destroy carefully the votes and opinions of the members."

2. Compare 1 Bishop, C. P. § 1005.

3. 1 Bishop, C. P. § 1005.

4. See DIGEST, 447, 448.

5. In the naval practice, the form of convicting is to find "Proved." See, for example, the recent case of Medical Director Wales, in G. C. M. O. 21, Navy Dept., 1885. As to the finding in the navy of "not proved" or "not proven," see *post*.

is is also the case where there are several specifica-
ıe charge, and the accused is found Guilty or Not
of the specifications and similarly of the charge.
many specifications there may be to a charge, such
ı any one, (which is properly pleaded and apposite
) is sufficient to support a similar finding on the
like a conviction on one good count of an indict-
ort a sentence.[1]

Not Guilty, (or Guilty without criminality,) of the
or of all the specifications where there are several,
ty of the charge, is an inconsistent and incongru-
ıce the finding on the specification or specifications
charge of support,—leaves it wholly without sub-
ı finding of Guilty upon it is a nullity in law.[2]

r hand, to find Guilty of the specification, but Not
charge, may be a good and legal verdict. It is
he facts set forth in the specification do not as
er the circumstances as developed by the evidence,
military offence indicated by the charge. But
ification is properly drawn, and the facts as averred
if found, constitute such offence,—to find Guilty
ation but Not Guilty of the charge is erroneous and
and such a finding will not support a sentence.[3]

g the plea. A familiar form of finding, (or rather
he finding,) upon a charge or specification, where
the same as the plea, is by *confirming*, as it is ex-
lea. But this form has no further or other effect
finding of Guilty or Not Guilty as the case may be,
age is derived from employing it.[4]

n of acquittal. Where the accused is found Not
charge or charges, it is usual to add in terms that

47, 448.

52; G. O. 60, 107, Army of the Potomac, 1861; Do. 95,
53, Dept. of the East, 1865; Do. 6, Dept. of Cal., 1865;
the Gulf, 1873.

52.

that the court "confirm the plea of the prisoner," (with-
ifically that they find him Guilty or Not Guilty,) is ex-
ned by the reviewing authority in a case in G. O. 43,
uth, 1871.

he is *acquitted.* This is indeed unnecessary since the findings made fully acquit the party in law;[1] but the form is now so w recognized that to omit it in any case would be exceptional a invidious.

Guilty without Criminality. Usage has given sanction a form of finding, on a *specification*, of 'Guilty but without cri nality,' or 'attaching no criminality;' or in terms to such effe It is principally resorted to where the accused is found to h committed the acts or done the things alleged in the specifi tion, but without the guilty intent or knowledge essential to co stitute the military offence charged. Such finding will of cou properly be accompanied by a finding of Not Guilty of the cha unless indeed there be in the case some other specification u which an unqualified finding of Guilty has been arrived at. T finding, however, is not one to be encouraged. It is virtually form of acquittal,[3] being a determination that the accused is guilty in law. It will therefore be more legally accurate, as w as more military and more just to the accused, to express record the finding simply as "Not Guilty."

Not Proven. This refinement, derived from the Scotch l though at one time somewhat resorted to, is no longer sanctio in either the English or American military practice.[4] While, a substitute for "Not Guilty," this form may in some cases e press more nearly than the latter the actual opinion of the court, yet lacks the directness and conclusiveness desirable to be attac to the judgments of a court-martial, and, because of its ambigui can hardly fail to have a sinister and injurious effect upon t

1. See McNaghten, 159.

2. A more exact form would be that they "find the facts set forth b attach no criminality thereto." G. O. 11 of 1851; G. C. M. O. 69, De of the Mo., 1869.

3. Circ., No. 4, Dept. of Pa., 1865. This form of finding has som times been resorted to where the accused has been found to have be insane or mentally deficient at the time of the offence. See instanc in G. O. 13, Northern Dept., 1864; Do. 52, Dept. of the Gulf, 1862; D 40, Dept. of the Susquehanna, 1864. Properly, in such cases, the a cused should be acquitted—the *ground* of the acquittal being specifi or the proceedings should be suspended, without making any findi as indicated in Chapter XX—"Where the accused is insane."

4. Kennedy, 105; Simmons § 625; Griffiths, 76; Bombay R., 3 O'Brien, 267; De Hart, 182; Benét, 133; Coppeé, 83.

of the accused. It is also objectionable as counter-
legal principle that a man is to be held to be innocent
ıly proved, *i. e.* proved beyond a reasonable doubt, to
This finding is, however, in common use in the
tice.[1]

Finding. This term implies a much more consider-
:ity than does the term "partial verdict" in the civil
The different kinds of partial findings recognized
law are as follows:—

ing with Exceptions—In Specifications. Where
:tial determines that the accused is guilty of a speci-
: not precisely as laid, that is to say is guilty of a part
:he remainder, or is guilty of the substance of the en-
:ation but not of certain details, it may, and it is its
ıvicting him thereon, to except specifically from the
Guilty such portions as are not proved, and thus de-
:act measure of the criminality deemed to be estab-
hus, it may find him Guilty of the facts set forth in
:he averments, and Not Guilty of those set forth in
:r averments; or it may find him Guilty of the speci-
a whole except only as to certain designated words,
:ticles, quantities, or other matters of description set
in.[4] Having thus shaped its finding on the specifica-
ing to the proof, it may find the accused Guilty of the
vided of course there is enough left in the specification
the charge. If so much has been excepted as not to
;h to constitute the specific offence alleged, (or a minor
ally included in it,) or if the effect of the exception
cause the specification to describe another and quite

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ommander Mackenzie's Trial; also current G. C. M. O., *passim*. A variation of this form, not unfrequently adopted, oved in part," (specifying what part ;) or "Proved except" s or allegations, (specifying the same.)

Bishop, C. P. § 1009.

GEST, 262, 263; De Hart, 181; O'Brien, 264; G. O. 59, Potomac, 1861; Do. 34, Dept. of the Cumberland, 1867; 870; G. C. M. O. 59, Dept. of Texas, 1872. This form of w adopted in the British law. See Rules of Procedure, 43.

f extended exceptions may be noted in G. O. 43, 159, 282, C. M. O. 160, 170, 191, of 1864; Do. 303, 565, 607, of 1865; 35.

distinct offence from that designated by the charge,—a fi of guilty upon the charge cannot be sustained, unless indeed be in the case some *other* specification or specifications ap to the charge upon which a substantial conviction has be rived at. The most simple and familiar illustration of ception detracting from the legal virtue of a specification excepting by the court of the word or words which expr *gravamen* of the offence in law. As where the charge is Vi of the 60th Article of war, and the specification alleg "knowingly" presenting of a fraudulent claim upon the States: here, if the court, in convicting upon the specifi excepts the word "knowingly," it acquits the accused *gist* of the offence, and cannot, (upon such finding alone,) convict him under the charge.[1] Such instances, howe now rare; exceptions, leaving the substance of the speci unaffected, being frequently and judiciously resorted to practice of our courts-martial.

In charges. What has last been remarked has referen to the *specification*, occasions for making exceptions in being seldom presented. It is only indeed where the ch inartificially and faultily drawn, or is "double," or ex more than the offence found, that an exception therein w likely to be made. Thus in a case published in Orders War Department where one of the charges was "Embezzli misapplying military stores," the finding of the court t was "Guilty, excepting the words 'embezzling and.'"[1] the charge is duly worded according to the terms of the of war upon which it is based, it is properly indivisible exception of any part made in the finding will not be legi Thus where the charge is "Conduct unbecoming an offi a gentleman," to except from the conviction thereon the "and a gentleman," and find the accused guilty of conduc coming an officer only, would be irregular and unauth

1. See the point illustrated in G. O. 28 of 1859; Do. 34, Dep Mo., 1863; Do. 20, 54, Northern Dept., 1864; Do. 28, Dept. of West, 1865; Do. 11, Dept. of the Cumberland, 1867; Do. 41, the Platte, 1870; also DIGEST, 263.

2. G. O. 341 of 1863.

3. This finding, which had been previously sometimes made b martial, (as in Capt. Dyson's case, G. O., Tenth Mil. Dist., Nov. where it was approved without remark by Maj. Gen. Scott,) w

:er is not an offence specifically known to the military if, in such a case, the court do not consider the conduct becoming a gentleman as well as an officer, they should quit the accused altogether, or find him guilty of "Conhe prejudice of good order and military discipline."

nding with exceptions and substitutions. The au-f a court-martial to make a partial finding is not limited :re making of exceptions. Where, while the allegations ification are substantially made out, certain items therein recisely proved as averred, the court, in excepting the .y *substitute* the true facts or details as established by the . As, for example, where sums of money, numbers of inds or quantities of articles, species of military stores, ls spoken, names of persons, dates, or places, have been ly set forth in the specification, and the true particulars n disclosed in the course of the testimony on the trial; in :s the court, in its finding of Guilty, may and properly pt the erroneous and substitute for them the correct state-words of description.[1] The authority to make substi-; subject to the same conditions as the authority to make ıs, *viz.* that the specification shall not be rendered legally , or the nature of the offence so modified that the finding : specification will not support a conviction upon the

ırd to the authority to except and substitute in findings, : remarked that it is certainly one of no little practical l convenience. By its exercise defects in the pleadings considerable extent be remedied, and variances between dings and the proof be in the main cured. Moreover, ıg is thus made to correspond with the precise facts of justice to both sides is more nearly done, and the accused ore effectually protected against a second prosecution on the same transaction. It is of course always desir-nilitary cases that, where practicable, the charges and

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d and discontinued, as a finding neither of a lesser included ɔr of any offence known to military law, by G. O. 8 of 1856. ;. O. 49, Dept. of Dakota, 1871; De Hart, 373; O'Brien, 161. Simmons § 852–855; DIGEST, 263; and instances in G. O. 41, ;96, of 1863; Do. 5, 7, 53, of 1864; G. C. M. O. 314, 325, of 1864; ;22, of 1865; Do. 187 of 1866.

specifications should be so drawn, and the case so prepared the averments will accurately represent the facts, and the mony will verify in detail the averments: where this can be it will rarely be necessary to qualify the findings in the n indicated.

Conviction of a Lesser Offence. This is a species tial finding familiar to the civil procedure, and which at n law illustrates also the practice of exception and substi It is properly resorted to where the offence charged which includes, as a necessary constituent, another offe lesser gravity, and where the evidence—the accused pleaded Not Guilty—falls short of fixing upon the accu superior but shows him to have committed the inferior c In such cases the court may find him Not Guilty of the charged but Guilty of the minor constituent.[1] And it sh find, since otherwise the true degree of criminality in t will not be pronounced, and the accused will escape con and punishment altogether; for if simply found Not G the major offence he is fully acquitted of the minor co within it.

Thus, where the evidence warrants it, manslaughter i found under a charge of murder, larceny under a charge bery, simple assault under a charge of battery, an *atte* commit an offence, or, (in the case of a violent crime,) an with intent to commit it, under a charge of the offence itsel absence-without-leave under desertion.[3]

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1. See Adye, 214; Tytler, 321; Simmons § 622; Kennedy, 185 by, 72; Macomb, 63; O'Brien, 265; De Hart, 185; DIGEST, 264 compare Grant *v.* Gould, 2 H. Bl. 69; Reynolds *v.* People, 83 Ill Note also the similar authority given in criminal cases in the States courts, by Sec. 1035, Rev. Sts.

2. See Dynes *v.* Hoover, 20 How. 79, where the finding, by court-martial, of an *attempt to desert*, under a charge of deserti pears to be recognized as legitimate. And see with this the rece of Bankhead *v.* U. S., 20 Ct. Cl. 405.

In Prindeville *v.* People, 42 Ills. 217, the court, in affirming a tion of assault with intent to commit rape under an indictment fo remark, generally, that—"Where the prosecution must prove ev necessary to constitute the lesser offence, together with the ad facts which make it the higher offence, in order to justify a co for the latter, then a conviction may be had for the lesser offenc an indictment for the greater."

3. Compare XIII Opins. At. Gen. 460. It may be repeated

herever a lesser offence is thus found, the findings upon the ification and the charge should be so framed as to be con- nt, and the finding on the specification should be such as to ort the finding on the charge. With this view, there should erly be *excepted* from the specification such words as in law acterize only the superior offence. Thus, in finding man- ghter under a charge of murder, the allegation of *malice afore- ght* in the specification, should be in terms excepted from the ing of Guilty thereon, and as to this the accused should be d Not Guilty. So, where, under a charge of desertion, the ification sets forth that the accused 'did desert,' &c., the t, if proposing to find Not Guilty of desertion but Guilty bsence-without-leave, should, from the finding of Guilty 1 the specification, *except* the words alleging or describing a rtion; otherwise the two findings will be inconsistent. And, o excepting, the court should further *substitute* the words— absent himself without authority,' or other words properly riptive of the real offence.[1]

need scarcely be noted that while a court-martial may always ict of a lesser kindred offence, it is not empowered to find a er or graver offence than the one charged, nor an offence of ferent nature.[2] Murder cannot be found under a charge of slaughter, nor robbery under a charge of larceny; nor, on other hand, can burglary be found under an indictment for ny or arson. Similarly, drunkenness on duty cannot legally und under a charge of simple drunkenness or disorderly con- , nor can conduct unbecoming an officer and a gentleman be d under a charge of drunkenness on duty.[3] And this though

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y such a finding, the accused must have pleaded Not Guilty. Where ccused deliberately and intelligently pleads Guilty to a charge of rtion, he cannot legally be convicted of absence-without-leave r it. See G. O. 231, Fifth Mil. Dist., 1869; Do. 24, Dept. of the e, 1871.

DIGEST, 264. A simple finding, under a charge of desertion, of t Guilty but Guilty of absence-without-leave," *unaccompanied by xceptions or substitutions*, though irregular and exceptional at mil- law, would yet be legal and effectual. Compare Morehead *v.* , 34 Ohio St. 212.

Kennedy, 185; Simmons § 700; Maltby, 72; Macomb, 63; O'Brien, DIGEST, 264.

See G. C. M. O. 6, Dept. of the Gulf, 1876; G. O. 14, Army of the nac, 1864.

the evidence clearly shows that the greater or the distinct offe was the one actually committed; for a party cannot be convic of an offence of which he has not been notified that he is char and which he has had no opportunity to defend.

Conviction under one Article of War of a Violation another Article. Though at one time otherwise ruled,[1] it now settled by the uniform practice of the service that where charge is one of the specific designated offences made punisha by the Articles of war other than the general, or 62d, Artic and the evidence fails fully to sustain the charge as laid, fixes upon the accused a neglect of duty or disorder as involv in the acts alleged in the specification, the court may properly him Guilty of the specification, (with such exceptions, &c., may be required,) and Not Guilty of the charge but Guilty "Conduct to the prejudice of good order and military discipline This finding, of an offence in violation of the general Arti under a charge for a violation of a specific Article, was first s tioned where the charge was "Conduct unbecoming an offi and a gentleman," in violation of Art. 61, and is still most quently resorted to thereunder.[2] It has since, however, been tended to *all cases of charges of specific offences* made punisha by the code, having been especially applied to such as Disobe ence of Orders, Disrespect to a commanding officer, Mutiny, M behaviour before the enemy, Breach of arrest, Violations of A 60, and—in time of war—Violations of Art. 58.[3] The legal theo upon which it is based is that it is a form of finding of a les included offence, every specific offence being viewed as includi either a neglect of duty or a disorder in breach of discipline; it is resorted to in order to prevent the failure of justice whic would in general be incurred were it not availed of. It shou not, however, be employed where the specific offence charged substantially established beyond a reasonable doubt. For thou it might be agreeable to the court to relieve the accused of so share of the culpability thus fixed upon him, such action wo

1. In G. O. 17 of 1856; Do. 28 of 1859.

2. So, occasionally, in the navy. See G. C. M. O. 29, 30, Nav Dept., 1882.

3. See cases of such findings approved in G. O. 282 of 1863; G. M. O. 171 of 1864; G. O. 4, Dept. of the Gulf, 1872; Do. 163, Dept. the Mo., 1870.

evasion of responsibility on its part and a dereliction of duty its official oath.[1]

: authority, however, to employ this form does not extend d the cases above indicated. Thus the reverse of this find- hat is to say a finding of Guilty of a *specific* offence under ge of "Conduct to the prejudice of good order and mili- iscipline" is not sanctioned, and, if made, would be dis- red as a gross irregularity,[2] especially where the punish- prescribed for the offence found was more severe than that ized for the offence charged. Thus a conviction of a vio- of Art. 21, (a capital offence,) could not legally be made a charge of a violation of Art. 62. And so of a finding of ecific offence under a charge of another specific offence,— Conduct unbecoming an officer and a gentleman under enness on duty, or Mutiny under Misbehaviour before the ; this also would be unauthorized, as finding the accused of an offence to which he had not been called upon to plead e defence.[3]

ay be added that a finding under a specific Article may be ed as a valid finding of "Conduct to the prejudice of good nd military discipline," though not formally so expressed, e in substance an equivalent. As where, under a charge of ation of Art. 21, the finding is Not Guilty but Guilty of ordination," or where under a charge of Drunkenness on a violation of Art. 38, the finding is Not Guilty but Guilty mple drunkenness."[4] Such forms, however, are now rare.

viction of a Lesser Degree or Grade of a Criminal ce. While the military law does not recognize grades or s of criminal offences cognizable by courts-martial,[5] such

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IGEST, 266; G. C. M. O. 6, Dept. of the Platte, 1882.

IGEST, 264; G. C. M. O. 78, Dept. of the Mo., 1874; Do. 6, Dept. Gulf, 1876.

IGEST, 265, 266. And see G. O. 14, 27, Army of the Potomac, also G. C. M. O. 123, Dept. of Cal., 1882, where a finding of 'of a violation of Art. 17,' under a charge of violation of Art. 60, proved as without legal sanction.

ipon & Col., 154.

here is a form of finding in vogue in the navy, (though unknown rmy,) of—"Guilty in a lesser degree than charged," followed signation of the specific degree found. See instances in G. C. M. 33, Navy Dept., 1882; Do. 6, Id., 1883.

courts, when passing judgment, in time of war, upon crimes the class specified in Art. 58, have in a few cases made findi of a lesser degree of the crime charged. So, military comm sions, when acting as substitutes for the State courts under Reconstruction Laws, have sometimes made similar findings.

III. ADDITIONS TO THE FINDING.

It is a peculiarity of the military procedure that a court-mar in its judgment, is not confined to a bare acquittal or convict but may characterize or explain the finding, (or sentence,) o company it with animadversions, recommendations or othe marks, as follows:—

1. Thus, in pronouncing the accused Not Guilty, the co in lieu of a simple acquittal, may "*fully*," or "*honorably*," "*fully and honorably*" acquit. These terms add nothing to legal effect of the acquittal, but are still occasionally emplo though less so than formerly.[1] "*Honorably*," according to authorities,[2] is not in general to be employed except in c where the alleged offence is not merely a violation of milit duty but one of which a conviction would have dishonored individual—as, for example, conduct unbecoming an officer a gentleman, misbehaviour before the enemy, embezzlement other fraudulent act made punishable by Art. 60. This and other like forms, however, should be reserved for exceptio cases, since their use, if more frequent, would detract somew from findings of Not Guilty when expressed *without* such e bellishment.[3]

2. The court, in connection with an acquittal, may also *refl upon the charges* as malicious, frivolous, vexatious, unfounde &c.,[4] or upon the *accuser or prosecutor*, (or prosecuting witnes

1. See recent instances in G. C. M. O. 20 of 1885; Do. 125, Dept. Cal., 1884.

2. Simmons § 625; Kennedy, 196; Griffiths, 77; Bombay R., 3 Clode, M. L., 151–2; Maltby, 71; O'Brien, 268; De Hart, 182.

3. See De Hart, 182.

4. 2 McArthur, 264, 266; Simmons, § 703; Kennedy, 197; De Ha 183; O'Brien, 268; G. O. of Nov. 11, 1816, (Maj. Gen. Gaines' cas Do. 8, Middle Dept., 1865. In a G. O. of Nov., 1817, the court, in c claring certain charges to be "frivolous," adds that it attaches no c sure to the judge advocate who subscribed them, since he had done merely *ex officio*.

l by personal animosity or other improper motive,[1] or culpable with the accused, or more culpable—recom- :hat he be himself brought to trial,[2] or as offending litary usage by preferring stale or accumulated charges, h comments, however, are not now frequent in our he court commonly leaving this class of criticisms to y the reviewing authority.

:ourt may *animadvert upon the statement* or argument :used, (or judge advocate,) as being disrespectful or objectionable in tone or particular language.[4] It may upon any *improper conduct*, during the trial, of either ties, counsel, or witnesses, and may remark upon the ›f the latter as inspired by personal feeling or preju- nents, however, upon civilian witnesses and persons ally and properly be more guarded than need be those bers of the army. Where a witness is believed to have :ly, the facts should be *specially* brought to the atten- reviewing commander.[5]

·e the evidence has disclosed a *defective state of dis-* ın objectionable practice at a post, &c., the court, in ion, has sometimes remarked upon the same, recom- dministrative changes or reforms.[6]

:s-martial are sometimes induced to add *explanations* dings or to give the reasons therefor, especially where .n view of the character of the testimony, may appear justification. Such action, however, must in general ssary and unadvisable.[7]

:e indeed the evidence or proceedings indicate *insanity* ıental incapacity on the part of the accused, the court, ing, (or convicting,) will properly state the facts, and

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.ses in James, 35, 203, 266, 461, 727; also Simmons § 701, h, 504, 533; Kennedy, 170; Clode, M. L., 151; O'Brien, ırt, 183; G. O. 3 of 1853; (remarks of Maj. Gen. Scott.) ırthur, 267; Delafons, 278.

, 539.

›ns § 704; James, 461; O'Brien, 268; Lieut. Kennon's Trial,

reflections upon the testimony or deportment of *witnesses*, 366, 539; Simmons § 705; Kennedy, 197; Hughes, 85; 8; De Hart, 183–4.

›ns § 702; Bombay R., 58; O'Brien, 268; De Hart, 183.

ıtances in G. O. 374 of 1863; G. C. M. O. 73, 74, 200, of 1864.

may add such *recommendation*—as that the accused be dis from the service, or committed to the Government Asy may seem to be called for.[1]

Limitation of the authority. But—it may here be while the court may sometimes properly recommend or action to the reviewing commander, it may not itself ass take action pertaining to his province. Thus where the in acquitting a soldier, directed that he "be discharge arrest and returned to duty with his regiment," this additi properly disapproved as transcending the authority of a martial.[2]

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1. See Simmons § 590; Kennedy, 195; O'Brien, 266; G. O 1824; Do. 36 of 1825; Do. 20, Western Dept., 1861; Do. 52, D the Gulf, 1862.

2. G. O. 60, Army of the Potomac, 1861.

CHAPTER XX.

SENTENCE AND PUNISHMENT.

The Finding having been completed, and having resulted in a nviction upon the Charge or upon some one at least of the iarges where there are several,—or in a conviction of a lesser ence included in one charged,—the court next proceeds to adge the Sentence, *i. e.* to affix a penalty or penalties for the ence or offences found.[1]

The subject of this Chapter will be conveniently presented der the following heads:—

I. The Course of Proceeding.
II. Classification of Sentences.
III. Principles governing the imposing of discretionary sentences.
IV. Principles governing the framing and substance of the sentence in general.
V. The specific punishments separately considered.
VI. Prohibited and Disused Punishments.
VII. Remarks with Sentence, and Recommendation.
VIII. Disciplinary Punishments.

I. THE COURSE OF PROCEEDING.

Voting and Deliberation. Where the Article or Articles of ır, under which the accused has been convicted, is or are mantory in expressly requiring a certain punishment or punishents specified to be imposed upon conviction, the office of the

ı. The term "Sentence" is now uniformly applied in practice to the nal designation by the court of the punishment or punishments. In Resolutions of the Continental Congress, (see III Journals, 144, 158, .; IV Id., 268,) "sentences" of *acquittal* are sometimes referred to, word sentence being employed as a general term equivalent to judgıt. And note a similar use of the word in cases reported by James, 281, 462, 463, 471, 639, 760, 786, 791, 794, 820, 823; also in case cited Simmons § 563.

court simply is to cause the legal sentence to be entered of reco by the judge advocate, no discretion being allowed and no deli eration or vote being called for. In cases, however, in which th sentence is left by the code to the discretion of the court, th members, the verdict being completed, commonly proceed at on to vote for a punishment or punishments,[1] in the manner usual observed upon the Finding, and already indicated. The co may of course take an *adjournment* between finding and senten if deemed proper and expedient.

The voting may be either oral and open, beginning with th "youngest in commission" of the members as directed in A 95; or in writing and secret, the member's name not being a pended to his vote. The latter form is, except in simple cas that usually pursued: it is also in general the preferable one, n only because, the votes of individuals not being known, the can be no danger that the opinion of a senior member will u duly influence that of a junior, but also for the reason that th different awards, combining as they may several distinct pen

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1. It need hardly be remarked that no *evidence* can be received after t finding and before sentence. The proceeding, authorized in the Brit law, (Rules of Procedure, 45,) of introducing at this stage evidence as t character and service, including records of arrests and convictions if an has not been sanctioned in our practice. In recent cases in the Depa ment of the Columbia, in which records of previous conviction had be referred to at this stage by the court-martial, its course was comment upon, and action was taken, by Gen. Pope, (Dept. Commander,) as fol lows:—"In the cases of Privates *John Connors*, Company 'A,' 14th Infantry, and *John E. Powers*, Light Battery 'E,' 1st Artillery, the Court, afte the findings and before the sentences, called for and examined, withou the assent, so far as appears, of the accused, the records of their respec ive companies, which showed in case of Private *Connors* that he h been three times, and in case of Private *Powers* that he had been fo times, convicted of military offences. There is no authority for su action in our military law, and the same is disapproved. Even had eithe of the accused assented, the action would have been irregular, since su facts (unless recited by way of inducement in the specification and ad mitted by a plea of guilty) can only be introduced as *testimony*, in th usual manner and subject to the rules of evidence. Otherwise the pro ceedings, findings and sentences are approved; but as the measure o punishment awarded by the Court was probably influenced by the record improperly introduced, two (2) months of the confinement and forfeitu in case of Private *Connors*, and three (3) months of the confinement an forfeiture in case of Private *Powers*, are remitted. As thus mitigated the sentences will be executed." G. C. M. O. 59, Dept. of the Colum bia, 1884. And see a precisely similar case in Do. 60, Id.

ll, when expressed in writing, be the more definite and and the more readily compared.

›allots are commonly collected by the judge advocate, and . and announced by him or the president. Where no pun- : is found to be concurred in by a majority upon the first :ther votings are to be had until some final sentence comes ›proved by a majority of the members present.[1]

the first vote, or at any other stage of the voting, the 's, with a view to the reconciling of differences of opinion, ;age in such discussion as may be desirable; and here, as e Finding, the equality of the members is to be preserved, being entitled to the same freedom of expression and the nsideration as a senior.

e the sentences originally voted are found all to differ, it ı an approved practice for the court to proceed to vote em in succession, beginning with the least severe, until hem receives the vote requisite for its adoption.[2] A ma- f the votes may sometimes be found to concur in some alty or more: in such a case the proceedings will be sim- ›y treating such penalty or penalties as agreed upon; the ›eing then resumed upon the other propositions. The which has prevailed somewhat in British courts-martial g—when opinions differ—first upon the *species* of the pun- , and then upon the *quantum*,[3] has not been common with nay of course be resorted to if thought proper.

y be remarked indeed that neither law nor regulation has ed any special routine to be pursued in the making up :ntence. The usual form, as above outlined, is thus sub- 'ariation at the discretion of the court, which may indeed, fit, dispense with voting altogether, and arrive at its con- , by a comparison of views in an informal conversation.

of joint accused. When two or more persons have ed on joint charges and convicted, their sentences must *al*, although the punishments awarded be the same. If

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to the form in general pursued in voting upon the sentence, see 11; Griffiths, 84; Hughes, 90; Maltby, 82; O'Brien, 269; Di- 7.

3rien, 270; DIGEST, 447.

ımons § 641; Griffiths, 84; Hughes, 91, 93; Manual, 531; 270.

the sentence be discretionary with the court, a *separate voting* concurrence should therefore be had as to the sentence of each of the accused.

Majority and Two-thirds Votes. The question of the selection of the sentence, or of any punishment, like all other questions arising in the procedure of our courts-martial, is, (except in the single instance of the death penalty,) determined by a majority vote. In the excepted case two thirds of the members present and acting must—as required by Art. 96—concur, *i. e.* four of a court of five members, five of a court of seven, six of a court of nine, eight of a court of eleven, and nine of a court of thirteen. In all other cases a simple majority is sufficient, if it is necessary, to impose a punishment. A *tie* vote, given when there is an even number of members, is futile and determines nothing. Where it occurs, the voting must be continued till a majority in favor of a certain sentence or punishment is obtained.

Duty of Members who on the Finding Voted to Acquit. A marked diversity of opinion once prevailed upon the point whether the members, (where the sentence was discretionary,) were obliged to vote a sentence without regard to what may have been their vote upon the finding,—whether, in other words, those who had voted for an acquittal might not properly be excused from voting a punishment. At the first impression it might seem unreasonable and inconsistent that a member, fully persuaded that the accused was innocent, or at least that the evidence had failed to convict him beyond a reasonable doubt, and who had voted accordingly, in the minority, for an acquittal, should at the next moment be required to adjudge that a specific punishment be imposed upon him as upon a guilty person. But this apparent inconsistency disappears when the principle is recalled, which has heretofore been set forth as resulting from the fundamental rule of the government of the majority in court-martial proceedings; *viz.* that the finding, when completed, becomes the act and judgment of the court as a *unit*, the opinions of the majority and minority no longer existing as such but being absorbed in the conclusion of the whole. Where, therefore, the accused has been found guilty, the conviction is to be recognized and acted upon by each member as a fixed fact—as something which has passed out of the region of individual opinion

come ascertained and concluded. Though he may not guilty, he is to vote upon the sentence precisely voted for a conviction, or as if the fact of guilt had ıined by some competent agency wholly independently and the rightfulness of such determination was be-on.[1]

ıe must not only vote a sentence but an adequate sen-ɔne commensurate to the offence or offences found. ʼoted to acquit, he gives his vote for a slight and inad-alty, he fails in his full duty as an officer and mem-:ourt.[2]

entence Necessary on Conviction. But though e pronounced be inadequate, *some* sentence must al-ʼ a conviction. For a court, as has sometimes been ıit to award a sentence for the expressed reason that ʼffence is shown to have been a very slight one, or that .lity of the accused was greatly palliated by the cir- of the case, or that he has been held for an unrea-g period in arrest or confinement before trial, &c.,— d irregularity.[3] And so of any mere direction as to ion of the accused, or recommendation as to his dis-lressed to the reviewing authority;[4] such not being a properly a substitute for one.

he accused has escaped. The fact that, pending .e accused has escaped from military custody furnishes

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ı this subject, McNaghten, 117–129, and Kennedy, 198–206, thors being especially full and pointed; also Simmons § 637–s, 81, 84; Hughes, 93; Bombay R., 35; O'Brien, 269; De ɔı; Lee, 155; Capt. Barron's Trial, (Navy,) 333; DIGEST, ons § 639, cites a case of a member of a court-martial, who, ed to vote a punishment after having voted to acquit, was ıght to trial for the neglect of duty involved. It is now ex-ıded by the English Rules of Procedure § 68, that—"Every ı court must give his opinion on every question which the decide, and must give his opinion as to the sentence, not-· that he has given his opinion in favor of acquittal."

:Naghten, 125; also G. C. M. O. 163, Dept. of the Mo., 1882.

O. 27 of 1835; Do. 12 of 1836; Do. 45 of 1864; G. C. M. ɟ; Do. 8, Dept. of Cal., 1874; G. O. 20, Dept. of the South, ɔ, Dept. of Dakota, 1870.

ʃt under head of—"The sentence must constitute a criminal

no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in his case; and the court may and should thus find and sentence precisely as in any other instance. The court, having once duly assumed jurisdiction of the offence and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath.[1]

Where the accused is insane. Where indeed the evidence quite clearly shows that the accused was insane at the time of the offence, whether or not the insanity is specially pleaded as a defence, there can of course properly be *no conviction* and therefore *no sentence.* Where the fact is shown in evidence, or developed upon the trial, that the accused has become insane since the commission of the offence, here also the court will most properly neither find nor sentence but will communicate officially to the convening authority the testimony or circumstances and its action thereon, and adjourn to await orders. In some instances of this class the court has added a recommendation that the accused be discharged from the service,[2] transcending however in so doing its strict province.

Compromise Sentence. For the court to make up its sentence by dividing the aggregate of the different quantities of punishment voted—as the terms of imprisonment, fines, or amounts of pay to be forfeited—by the number of the members, and taking the average result as the sentence to be adjudged, is clearly not a proper or military proceeding.[3] Twyford[4] expresses the opinion that such a sentence is "illegal" and "not the sentence of the court." More correctly, however, this form, though not affecting the validity of the judgment, would be an objectionable

1. Compare Meade *v.* Dpty. Marshal, 1 Brock, 324; Fight *v.* State, 7 Ohio, 180; McCorkle *v.* State, 14 Ind. 39; State *v.* Wamire, 16 Id. 357. Upon the trial by military commission of Dodd and others, in Indiana, in 1864, the court, in the absence of Dodd, who had escaped, sentenced him to death, and its action was duly approved by the reviewing authority. These authorities have been referred to in Chapter XIX on the point that the court may *find* under similar circumstances.

2. See Chapter XIX—"Additions to the Finding, 6."

3. Compare Wharton, C. P. & P. § 842.

4. Guide Book, p. 20.

gularity:[1] it is certainly very rare in practice. To determine n a punishment by *casting lots* would be still more irregular.[2]

djournment and Reconsideration. In a case of imance, or where a conflict of opinion is developed upon a mal question, it is always proper for the court to take an adnment, pending its deliberation upon the sentence, in order the members may have an opportunity to reflect upon the es raised, consult precedents, &c., or in order that the judge ocate may be enabled to prepare an opinion or statement of law upon the point under discussion.

o, too, after a sentence has been agreed upon, the court poses the power to reconsider and modify the same at discretion, *ny time before the transmittal of the proceedings to the review-officer.* This doctrine was substantially affirmed at an early od, (1819,) in Private Williamson's case, where the action of urt-martial, which, having sentenced the accused to a term confinement, adjourned and on the ensuing day reconsidered sentence and substituted one of death, was held by Attorney eral Wirt to have been authorized and regular.[3] And the er to reconsider would extend to the substitution, for the tence, of a full *acquittal*, if deemed by the court just and per.[4]

Recording of Sentence. The sentence having been comted, is formally entered in the Record, for the action of the viewing Authority.[5]

See Simmons § 642; Hough, (P.) 793; Manual, 531.

Compare Wharton, C. P. & P. § 842; 1 Bishop, C. P. § 998 *a*.

I Opinions, 296–9. This authority, as indeed indicated by Mr. t, is analogous to that which may be exercised by civil courts, of ifying sentences when not in accordance with law. Thus in Miller inkle, 1 Park. 376, the court say:—"If, by inadvertence in proncing a sentence, a requirement of the statute has been overlooked, ay be corrected by the same tribunal before further action is taken. * * The court has the right to expunge or vacate the first sentence to pass a new sentence." And see 1 Bishop, C. P. § 1298 and cases d. A court-martial, however, is not restricted to errors of law as unds for reconsidering and modifying its sentence, but may change or any other good reason—as that it is inadequate, or too severe, or ppropriate to the nature of the offence.

That the same number of members need not take part in the reconration, provided a *quorum of the same* be present—see VII Opins. ttys. Gen., 338.

As to this action see Chapter XXI. In the British law, as lately as

II. CLASSIFICATION OF SENTENCES.

Distinction made by the Articles of War. The power of selection of punishment which a court-martial may exercise in imposing sentence depends upon the provision of law under which the charge is laid. The penal code of the army, in providing for the punishment of military offences, either prescribes a particular penalty to be adjudged in the event of conviction, or declares that a certain penalty shall be imposed *or such other* as the court may direct, or, without naming any penalty, simply leaves the matter of sentence to the will of the court. In the first case the sentence or punishment may be distinguished as *mandatory;* in the other two cases as *discretionary.*

Mandatory Sentences. The Articles of war which require that a certain specific punishment shall be imposed upon conviction are the 5th, 6th, 8th, 13th, 14th, 15th, 18th, 26th, 27th, 28th, 38th, 50th, 57th, 59th, 61st, 65th, 100th, and Sec. 1343, Rev. Sts. In imposing sentence for the offences made punishable under these Articles, the province of the court is simply ministerial—to pronounce the judgment of the law. It has no power to affix a punishment either more or less severe, or other, than that specified: any different or additional punishment is simply a nullity and inoperative.[1] If more penalties than one are prescribed for the offence by the statute, all are to be included in the sentence: if any one is omitted the sentence is illegal and of no effect.[2] Where there has been a conviction upon several charges setting forth different offences for which different mandatory punishments are provided, all must be embraced in the sentence. Where the conviction has been of offences for some one or more of which the punishment is mandatory, while for another or others it is discretionary, the mandatory punishment or punishments must certainly be affixed, no matter how widely or variously the court may further exercise its discretionary power or

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in the reign of James II, (see Art. 48 of his Code,) the presiding officer pronounced the sentence in open court,—as is still done in the French *conseils de guerre.*

1. DIGEST, 447; G. O. 13, Dept. of the Susquehanna, 1864; Do. 5, Fourth Mil. Dist., 1867. And compare Wharton, C. P. & P. § 752.

2. As—in the civil practice—"if a statute imposes a fine *and* imprisonment, both must be inflicted." 1 Bishop, C. L. § 941.

shment in the same sentence.[1] Indeed in all cases of punents of the mandatory class, it is not the court which decrees enalty but the statute; the distinctive function of the *court* ically terminating with the conviction.

scretionary Sentences. The Articles of war which leave unishment to the discretion of the court are the 3d, 16th, 19th, 20th, 21st, 22d, 23d, 24th, 26th, 27th, 28th, 30th, 31st, 33d, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42d, 43d, 45th, 46th, 47th, 49th, 50th, 51st, 54th, 55th, 56th, 58th, 62d, 68th, 69th, 86th and 101st.

tent of the Discretion in General. The authority erred is always a large one, no maximum, nor, except in a e instance,[2] minimum of punishment being in any case preed as a limit.[3] The discretion ranges from the slightest pen- as an admonition or a forfeiture of a trifling sum, to the severe, as imprisonment for life, dismissal, or—where it is pressly mentioned"—death.[4] Moreover it extends to the sing of any number of *different* punishments in the same nce,[5] subject only to the general rules and restrictions pres- to be considered. Further, it is illustrated by the fact that ed not be exercised at all, provided the case is one in which

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Or, though the discretionary power be not exercised at all. See

This is in Art. 58, where it is provided that, for the crimes speci- the punishment "shall not be less" than that prescribed by the law. It may be noted that Art. 101 does indeed limit a forfeiture y, imposed with suspension, to the term of the suspension. But erm is itself left without limit.

This feature in our code has been unfavorably commented upon by ien, (p. 487,) and later, as inducing an uncertainty and inequality nishment, the result being that, in cases especially of *desertion*, ent courts award quite different measures of punishment for similar of offence.

See Rex *v.* Suddis, 1 East, 316.

Our law, (long settled on this point—see O'Brien, 276,) differs from ritish, where, as it appears, two distinct punishments cannot, ex- when expressly authorized, be combined in the same sentence. ions § 687; Kennedy, 209. And see Army Act § 44. In a recent ican case in which dishonorable discharge, forfeiture of pay and ement in a penitentiary were combined in a sentence imposed conviction of a violation of Art. 62, the regularity and validity of ntence were expressly affirmed by the Supreme Court. *Ex parte* 1, 105 U. S. 700.

the *law* supplies some penalty. Thus where there has been a con-viction of two or more offences, for one of which the punishme is mandatory, the punishments for the others being discretionary the sentence of the court will be legally sufficient if it conta no punishment other than the single mandatory one.

III. PRINCIPLES GOVERNING THE IMPOSING OF DISCRETIONARY SENTENCES.

The Sentence is to be based upon the Facts as Prov and Found. The sentence should follow the findings and be judgment upon the facts as found. Thus, proof of valuable ser ice, general good character, or other extraneous circumstanc favorable to the accused but foreign to the merits of the ca (although sometimes properly considered upon the Finding material especially to the question of *intent*,) cannot—*strictly* be allowed to affect the discretion of the court in imposing se tence, but—if deemed to call for particular notice—should for the subject of a separate "recommendation" to clemency.[1] *practice*, however, the fact that the accused is shown to have h a good character or record in the service prior to his offence in general permitted to enter into the question of the punis ment to be imposed, and a court-martial will sometimes add to light sentence the explanation that it is "thus lenient" becau of such character or record. Regularly, however, the same rather ground for mitigation of punishment by the reviewin authority than for a milder judgment on the part of the court.[2]

Basing then the sentence upon the facts as established by th evidence and ascertained by the finding, the punishment w regularly and properly be measured by the nature and compar tive gravity of the offence as illustrated by the peculiar circu stances preceding and accompanying it, the intent manifested b

1. See G. O. 20, Dept. of the South, 1866; Do. 115, Dept. of the Mo 1867; Do. 15, 16, Dept. of Dakota, 1868; Do. 69, Id., 1870; G. C. M. O 163, Dept. of the Mo., 1882. And compare Simmons § 697; Harcom 146, 150.

As heretofore pointed out, the sentence cannot of course be influenced by facts not in evidence and known only to individual members. G. O. 20, Dept. of the South, 1866; Do. 8, Dept. of Arizona, 1874.

2. See, in G. O. 57, Dept. of Dakota, 1867, remarks of the Dept. Com mander upon certain sentences as being so inadequate as in effect to extend clemency and invade the province of the reviewing authority.

ffender, his *animus* toward the aggrieved person if any, the :quences of his act, its effect upon military discipline, &c.

scrimination on Account of Relative Rank of Of-ers. Where there are *joint* accused, different degrees of shment will often properly be called for, according to the , whether leading or secondary, taken in the criminal trans-n by the several individuals. Where a non-commissioned :r has been concerned with a private soldier in the offence, is jointly charged and convicted with him, his sentence, for ifest reasons, should be more severe than that of his associate. he sentence of an officer or non-commissioned officer con-d *singly* of a military offence should in general be more :e than would be that of an inferior under the same or simi-ircumstances.[1] It is however to be noted that a punishment h affects military *rank* is in general a severe one, and the : severe in proportion as the rank is the higher, so that re-ion in the case of a non-commissioned officer, or suspension at of a commissioned officer, will often prove a more rigor-penalty than would a moderate term of confinement in the of an enlisted man. The rank and office of the accused will properly enter into the question of the proper measure of shment to be apportioned.

iscrimination between Degrees of Criminality. In :ising its discretion as to the sentence, a court-martial will properly discriminate between cases of persons tried and con-d by it, severally, of the same offence, where the degrees of inality are shown to be materially different. In such cases unishments should be different also, and to prescribe the : routine sentence in each instance is not a just or proper oyment of the discretion devolved by the law.[2]

iscretion as affected by Jurisdictional Grade of Of-e. The discretion of a *general* court-martial in adjudging :nce is not restricted by the fact that the offence of which ccused has been convicted is one cognizable by, and ordi-y referred to, a garrison or regimental court. While the

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See DIGEST, 247.

Note remarks of Gen. McDowell in G. O. 18, Dept. of the South,

punishment is not necessarily to be any the more severe beca the case has been sent to a superior rather than to an infe court,[1] it may yet properly exceed that which the latter c legally impose if the facts as proved are deemed to require it

As affected by a Finding of a "Lesser" Offe Where a *lesser* offence has been found under the specific cha the court cannot, of course, impose a punishment legal only the offence actually charged;[3] nor can it properly impose o severe as that offence would justly have called for had it l found.

Discretion as affected by the Local Law. Excep time of war, in a case of one of the crimes specified in Art the authority of a court-martial as to the awarding of pun ment is not controlled by the local law. Where indeed offence found is one which would also be punishable by courts of the State, &c., in which it was committed, (or in wl the trial is had,) the civil statute fixing the penalty may wel consulted as an aid in arriving at a reasonable measure of p ishment for the military crime. The court-martial, howe is in no respect *bound* by that statute but may affix such sente as the interests of military discipline, as prejudiced by the offe committed, may be deemed to require, though in so doing it v considerably exceed the limit of the local law.[4]

Restrictions upon the Exercise of the Discreti Wide as is the discretion as to the sentence which is reposed a general court-martial by the 62d and the majority of the o Articles of war, the same is yet properly subject to such rest tions in regard to punishment as are prescribed by the Con tution, by the statute law governing the army, or by milit usage.[5]

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1. Manual, 54.

2. This simple point is noticed because of the erroneous view pressed thereon by De Hart, 53, 64–5.

3. See G. O. 77 of 1837.

4. DIGEST, 81, 450. And see *Ex parte* Mason, 105 U. S. 700.

5. See Simmons § 111; Kennedy, 208; Maltby, 100; De Hart, 196; X Opins. At. Gen., 160.

By Constitutional provision. The Constitution, in Art. II of the Amendments, provides that "excessive fines" shall t be "imposed, nor cruel and unusual punishments inflicted." is provision applies indeed only to the courts of the United ites, but courts-martial, though, as we have seen, no part of : U. S. judiciary, and not legally *bound* by such provision, will perly observe it as a general rule of practice.[1]

"Excessive fines." Fines at military law are adjudged inly with a view to reimburse the United States for some uniary loss occasioned by the offence of the accused: the idea punishment, however, of course enters into every fine, and a : reasonably increased for the purpose of punishment above : amount required to make good the loss would not be sub- t to objection. But a fine which should greatly exceed such ount, especially where the purposes of punishment were ade- ately answered by other penalties embraced in the same sen- ce, would be liable to the objection of being "excessive" in : sense of the Constitution.

"Cruel and unusual punishments." As to this phrase, may first be remarked that, in the opinion of the author, the rd "and" should be construed as *or;* it being considered that : prohibition is twofold, *viz.* of such punishments as are un- ual as well as of such as are cruel; in other words that it is t essential that the punishment shall be both cruel *and* unusual bring it within the prohibition of the Amendment, but that it ty be either. Further, the word "punishments," distinguished it is from "fines," is regarded as referring mainly to such nishments as are corporal in their nature, namely such as im- e restraint or suffering upon the body—as forms of imprison- nt especially. Then, as to the terms "cruel" and "un- ual"—an *unusual* punishment may be said to be one not ognized by law or usage.[2] Punishments may be rare without ng unusual. Thus confinement on bread and water diet, and l and chain, though now unfrequently imposed, are not "un- al" since they are still sanctioned by usage and not prohibited

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See DIGEST, 448, and authorities cited.

U. S. *v.* Collins, 2 Curtis, 194; Barker *v.* People, 20 Johns. 458: e *v.* People, 5 Park. 364; 1 Bishop, C. L. § 947; De Hart, 68; Benét, X Opins. At. Gen., 160.

by law. Whether a punishment is to be stigmatized as *cruel* d pends so much upon the nature and circumstances of the offen that no general definition of the word as here employed can we be framed. A punishment may certainly be harsh and severe and even in a degree unmerited,[1] without being cruel; and per haps as satisfactory an explanation of the term as can readily be given would be a punishment which inflicted an amount of bodily (or mental) suffering or injury out of all reasonable proportion to the full demands of justice.[2]

By the statute law. The punishment selected must not be one either expressly or impliedly prohibited by the Articles of war or other statute. Thus Art. 96 expressly prohibits the im position of the death penalty except in cases where the same is specifically authorized by the code. Art. 98 expressly prohibits the punishments of flogging, branding, &c. Art. 97, by a necessary implication from its terms, prohibits confinement in a penitentiary for purely military offences. The limitations, declared by Art. 83, upon the power of *inferior courts* to inflict punishment, are familiar to the service.

By military usage. This is the limitation recognized in Art. 84, by which members of courts-martial are required, among other things, to swear that, in cases not determined by express provisions of the code, they will administer justice "according to the custom of war in like cases." A punishment, observes Atty. Gen. Bates, "contrary to the usage of the service would for that reason be forbidden by law."[3] This usage has sanctioned in practice two classes of punishments, *viz.* certain ones adopted from the common law, (or civil statute law,) as fine, imprisonment with or without hard labor, and disqualification to hold office, and certain others peculiar or nearly so to the military service, such as cashiering or dismissal, dishonorable discharge, suspension, loss of files, forfeiture of pay, reduction and rep

1 See III Opins. At. Gen., 632.

2 See De Hart, 69; X Opins. At. Gen., 160; also instance referred to in Digest, 449 § 7, and case in G. C. M. O. 24 of 1873—where a term of solitary confinement in a "dark cell," imposed in a sentence with other penalties, was disapproved as likely to impair the health of the prisoner and so "amenable to the objection of being cruel and unusual."

3 X Opins., 161. And see XII Id., 529; Bombay R., 36; Macomb, 61; De Hart, 196; Digest, 448.

A punishment recognized by the laws of a foreign coun-
appropriate for military offences, such as the banishment
ized by the French law,[1] but which is unknown to the
of our service, would be illegal here.[2] So of a punishment
though once temporarily authorized by our own statute
o longer in force,) has never been recognized by our mili-
istom—reduction of an officer to the ranks.[3] And so of a
y, formerly not unfrequently resorted to, but quite discoun-
ed by the existing usage—the imposing of *military service*
as a punishment by sentence.[4]

896 of the Army Regulations,[5] in specifying certain pun-
its, (presently to be considered,) as legal for enlisted men,
the expression of the usage or usages by which these pun-
its have been sanctioned. This paragraph, it may be re-
d, is not viewed as necessarily restricting, at least in time

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ode de Justice Militaire § 185.

e an instance of this punishment in 3 Jour. Cong., 386. It has
nes been adjudged by military commissions in time of war. See

IGEST, 422–3. And see *post.*

Military duty is honorable, and to impose it in any form as a *pun-*
must tend to degrade it, to the prejudice of the best interests of
ice." DIGEST, 449. This punishment—in the form of imposi-
extra guard duty, extra drill, &c., or of an additional term of
was declared by the Judge Advocate General, early in the late
be subject to grave objection, and his views were adopted by the
ry of War and have been repeatedly followed in Orders. See G.
nd G. C. M. O. 329, of 1864; Do. 7 of 1871; G. O. 17, Dept. of
., 1861; Do. 8, Id., 1864; Do. 56, Army of the Potomac, 1862;
Dept. of the N. West, 1864; Do. 49, Middle Dept., 1864; G. C.
6, *Navy* Dept., 1882. In a recent case, in G. C. M. O. 61, Dept.
ota, 1884, in which the court, in adjudging a period of confine-
dded, as a further independent penalty, that the term of enlist-
d service should be extended for a like period,—this part of the
e is disapproved by Gen. Terry, who observes: "The term of
ent in the United States army is fixed by law at five years, and
no law which authorizes a court-martial to prolong that period
ice. * * * The sentence of a court-martial which increases
n for which a soldier has enlisted is illegal."

his paragraph, (of which the original was G. O. 21 of 1851,) is as
:—"The legal punishments for soldiers by sentence of court-
, according to the nature of the offence and the jurisdiction of
rt, under the law, are—death; confinement; confinement on
nd water diet; solitary confinement; hard labor; ball and chain;
re of pay and allowances; discharges from service, and repri-
and for non-commissioned officers, reduction to the ranks."

of war, the punishments imposable upon soldiers to those c nated;[1] others—hereafter to be mentioned—being also reg as still authorized by the custom of the service and usage of

IV. PRINCIPLES GOVERNING THE FRAMING AND S STANCE OF THE SENTENCE IN GENERAL.

The Sentence must Constitute a Criminal Judgm This principle results from the very nature of courts-martia tribunals invested only with a *criminal* jurisdiction and powe punishment.[2]

In the first place, therefore, the requirement of the sente must amount to a *punishment;* otherwise it is not only irregu but of no effect. Thus a sentence directing simply that the cused be "returned to duty" imposes no punishment, but reverse, and is therefore no sentence in law.[3] And so of form, adopted in one case, upon a conviction,[4]—"to be confi in a lunatic asylum;" such a confinement not being properly imprisonment or a punishment at military law.

In the second place the sentence cannot assume to impose form of *civil* liability, whether in the nature of debt or damag It cannot appropriate or dispose of the *pay* of an accused or pose upon him a *fine*, to the use or for the benefit of any in vidual military or civil, but can forfeit or adjudge the same the United States only.[5] Nor does the fact that the liability

1. See DIGEST, 448; G. O. 9, Third Mil. Dist., 1867.

2. See Chapter VI.

3. See G. O. 47, Army of the Potomac, 1862; Do. 5, 20, Dept the East, 1865; Do. 9, 53, Northern Dept., 1865; Do. 65, Dept. of kansas, 1865; Do. 5, Dept. of the Cumberland, 1866.

4. In a case in G. O. 49, Dept. of the Susquehanna, 1864.

5. G. O. 21 of 1851; Do. 2 of 1857, (incorporated in par. 909, Regs.;) Do. 18 of 1859; G. C. M. O. 82, 478, of 1865; Do. 91, of Va., 1865; Do. 4, Dept. of Texas, 1865; Do. 33, Dept. of Ala., Do. 87, Dept. of the Mo., 1868; Do. 32, Fifth Mil. Dist., 1868; Do. Dept. of Dakota, 1869; Do. 10, Dept. of the South, 1870; G. O. Dept. of No. Ca., 1865; Do. 7, Dept. of the Tennessee, 1866; Do. Dept. of the Miss., 1863; Harcourt, 173; DIGEST, 267, 271-2. compare Warden *v.* Bailey, 4 Taunt. 78; O'Kelley *v.* Latham, 462; Morris *v.* Whitehead, 65 No. Ca., 637.

Pay cannot be forfeited by sentence in favor of a "company tailor" or "company shoemaker," to whom the accused may be indebted. (G C. M. O. 30, Dept. of the Gulf, 1876.) Nor, under existing law, can be forfeited or stopped to satisfy the dues of a "laundress." (See pa

n out of a criminal transaction, as a liability for money or erty stolen or fraudulently or otherwise illegally obtained by accused, affect the application of the principle: in neither can the court, by its sentence, require the accused to refund ie injured party or to reimburse him for his loss.[1]

or, further, can a court-martial, in imposing a pecuniary fine orfeiture of pay, legally require that the amount shall be nded to, or paid into, a particular fund—as a hospital or com- y fund,[2] or be expended for the use of sick soldiers, &c., or llotted for the support of the family of the accused.[3] Nor it, in forfeiting the pay of a soldier, on conviction of having en a sum of money from a disbursing officer, require that the unt of the forfeiture shall be credited to the account of said er with the United States.[4] Further, a military court can- condemn an accused to return a specific article of property person whom he has illegally deprived of the same; nor can entence him to be imprisoned until he pays a certain amount, restores certain property, to a private individual.[5] Thus a rt-martial, in framing its sentence, can recognize no liability

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Army Regs.) Nor can it legally be forfeited to pay a "post ler" for articles previously sold by him to the soldier. (See DI- T, 384.)

G. C. M. O. 177, 186, of 1864; Do. 478 of 1865; Do. 63 of 1868; 33, Dept. of the East, 1866; G. O. 22, 26, Middle Dept., 1865; Do. Dept. of Dakota, 1869; G. C. M. O. 22, Dept. of the Mo., 1883; DI- T, 271–2. And see G. C. M. O. 10, Dept. of the South, 1870, in h a direction in a sentence that a portion of the pay of the accused ppropriated to indemnify the owner of property *destroyed* by accused, properly disapproved. Any appropriation of this class by a court- ial is in fact an assumption of *legislative* power.

DIGEST, 271; G. C. M. O. 91, Dept of Va., 1865. In G. O. 23, t. of Ala., 1866, a sentence imposing a fine, "to be appropriated to use of the Freedmen's Bureau," was properly disapproved. In a of a sentence, published in G. C. M. O. 217 of 1865, containing a iture of the pay of a soldier, "to be appropriated for the benefit of Soldiers' Home, if legal, and, if not, to be forfeited to the U. S. Gov- nent," it was properly directed by the reviewing authority that "the iture of pay will be to the United States." It may be remarked forfeitures, &c., of soldiers' pay, are appropriated for the benefit of Soldiers' Home by operation of law, according to the provisions of 4818, Rev. Sts., and that any direction in a *sentence* in regard to h appropriation is unauthorized and surplusage.

DIGEST, 271–2; G. O. 2, Middle Mil. Div., 1865.

G. C. M. O. 7, Fourth Mil. Dist., 1868.

G. O. 18 of 1859.

or obligation on the part of the accused except to the Unit States.

The Sentence must not Trench upon the Province the Reviewing Authority. The court, in its sentence, ma not assume a duty or power belonging to the reviewing officer other commander. Thus, it should not attempt to execute own sentence; as by adding to a sentence of dismissal of an cer—'and he is hereby dismissed accordingly,'[1] or, to a senten imposing a fine, that the same be enforced in a particular mo or by a particular official.[2]

Nor, for the same reason, is it authorized to direct in a se tence—as one of forfeiture for example—that the offender 'released from arrest, and returned or restored to duty;'[3] can it direct the assignment or transfer of a convicted soldier a particular regiment or organization;[4] or that a soldier, s tenced to be dishonorably discharged, be furnished transportati to his place of residence;[5] or that a soldier deemed insane be co fined in an insane asylum.[6]

A court-martial, in awarding the *death* penalty, need not should not designate in its sentence any time or place for execution;[7] nor, in connection with a sentence of *imprisonme* should it direct that the same be executed at a certain prison

1. James, 630, 660, 661; Simmons § 669; De Hart, 197.

2. DIGEST, 268. It would be especially irregular for a court-mar to direct a proceeding against a convicted party which it is for the ci authorities to initiate. Thus, in a case in G. O. 16, Mountain De 1862, where, to a sentence imposed upon an officer for embezzlem &c., it was added:—"And the court orders his property to be se by the commanding officer of his post and held subject to future legal disposition," this action was properly disapproved by the revi ing authority and the matter of the seizure "respectfully referred to U. S. District Attorney for action."

3. "This is transcending the province of a court-martial." G. O. Army of the Potomac, 1862. And see G. O. 65, Dept. of Ark., 18 and other Orders noted under head of—"The sentence must consti a criminal judgment," *ante*.

4. G. C. M. O. 408 of 1864.

5. G. O. 44, Dept. of the N. West, 1863.

6. G. O. 49, Dept. of the Susquehanna, 1864, cited *ante*.

7. DIGEST, 79. And see Tytler, 327; Griffiths, 87; De Hart, also, as to the similar rule in civil cases, Com. *v.* Webster, 5 Cush. 1 Bishop, C. L. § 951; 1 Id., C. P., § 1311.

ce specified:[1] these also are particulars properly to be deter-
ıed by the reviewing officer.

Again the court may not trench directly or indirectly upon the *rdoning power* of the commander. This is in fact done where e court—as has occurred in some instances—declares that, in ew of the long confinement undergone by the accused while aiting trial, or some other circumstance indicated, it awards sentence.[2] So, it is done, though less directly, where the urt, because of the previous good record of the accused, or other tenuating circumstance foreign to the merits, is induced to judge a mild sentence quite out of proportion to the gravity the offence committed. In such cases, as indicated in a pre-ous part of this Chapter, the court practically invades the prov-ce of the commander, whose function alone it is to determine ether, for any cause, the sentence shall be mitigated or re-tted.[3]

Further, a court-martial has of course no power to exercise, by sentence, any discipline or authority over the accused beyond limits of his punishment, or over any other person within command. Thus where to a sentence of reduction to the ks it was added by the court that the accused be precluded m holding any position as a non-commissioned officer for six nths, such addition was disapproved as unauthorized since the urt could not prevent the regimental commander from pro-ting the accused if thought expedient.[4] Similarly illegal was

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1. See G. O. 9, 16, Dept. of Ark., 1865; G. C. M. O. 12, 13, Dept. of Col., 1882; Circ. 4, Dept. of Penna., 1865.

2. In G. C. M. O. 8, Dept. of Cal., 1874, in a case in which the court, iew of the long confinement of the accused prior to trial, concluded to impose any punishment upon the conviction, the Dept. Com-nder, Gen. Schofield, remarked as follows:—"It is the duty of a urt in all such cases to decide upon and award a sentence which shall appropriate to the offence of which the prisoner shall have been con-ted, and to leave to the Reviewing Authority—upon a proper repre-ntation of the facts through a recommendation to clemency or other-se—to take such action as may seem to him demanded in the interests justice." And see a similar case in G. O. 69, Dept. of Dakota, 1870.

3. In G. C. M. O. 163, Dept. of the Mo., 1882, Gen. Pope, referring the discretion of the court as to the awarding of sentence, says:—"It s never contemplated that the exercise of this discretion should usurp encroach upon the pardoning power, residing only with the reviewing thority or the Chief Executive." And see Do. 8, Dept. of Cal., 1874; O. 57, Dept. of Dakota, 1867; Do. 20, Dept. of the South, 1866.

4. G. O. 10, Dept. of N. Mexico, 1865.

the action of a court, which, in imposing confinement feiture, upon a conviction for drunkenness, added in the that the sutler should be ordered not to sell the accuse thing on credit" thereafter.[1]

It need scarcely be added that any direction in a sentenc transcends the authority of the court, and encroaches u of the reviewing officer, may be wholly *disregarded* by t in his action upon the case.[2] He will properly, howe pressly *disapprove* the objectionable portion.

The Sentence should be Consistent with the Fi By this it is meant that the sentence must not impose ishment not authorized by the finding. Thus, where th several charges, and the accused is acquitted upon some a victed upon others, the sentence must adjudge only su ishments as are authorized for the offences of which the is convicted; otherwise it will be inconsistent with the f So, where the finding upon a capital charge is Not Gui Guilty of Conduct to the prejudice of good order and n discipline, a sentence of death will be inconsistent with t ing and therefore illegal.

It should be Definite and Unambiguous in T Where the punishment is one made mandatory upon the there need be no question as to the form of expressing th tence; it being proper and sufficient merely to specify th ishment by the word or words employed in the Article. the sentence is discretionary, the punishment or punish selected by the court should be stated in simple, clear, a mistakable terms, and with such precision in regard to det to convey the exact particulars intended to be conveyed t court.[3] Amounts of forfeitures and fines, numbers of files

1. G. O. 35, Army of the Potomac, 1862.

2. G. O. 9, 16, Dept. of Ark., 1865.

3. "A sentence, like any other writing, must, to be valid, be i terms that its meaning can be understood. And always the court s take especial care to make it precise and accurate." 1 Bishop, § 1297. "The sentence must be definite, exact, and perempt Wharton, C. P. & P. § 923. "It should obviously be expres clear and unambiguous language. Simmons § 644. "So that th and degree of punishment shall be set forth definitely and preci De Hart, 196. A sentence of imprisonment that fails to fix the inoperative, and should be disapproved unless corrected on re DIGEST, § 284.

and periods—years, months,[1] days,[2] &c.—of imprisonment, ension, &c., should be defined with especial certainty. :re—as is usual but not essential—the *name* of the accused peated in the sentence, it should be correctly given, and in ı form that there will appear no material *variance* between sentence and the finding or charge.[3]

urther, where there are imposed two or more different punish- ıts, the *order* of the execution of which will be material in cting the status or rights of the accused, or the interests of service or of discipline, the sentence should be so framed as indicate clearly the order in which the punishments are in- ded by the court to be executed. Thus where a soldier is sen- ced both to dishonorable discharge and a term of confinement, l it is proposed by the court that the former punishment shall -as it is in general preferable that it should be—executed be- e the latter, the sentence should read that he be discharged and ı confined, &c., or in terms to such effect.[4]

'o be Entire and Single. In the absence of any statutory :ction on the subject, usage has established that the sentence

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In the absence of any specific provision on the subject in our law, word "*month*" or "*months*," as employed in sentences, is treated ıeaning precisely what it means in ordinary parlance, and is held to ı in the civil practice, viz. *calendar* month or months. See DIGEST, also Moore *v.* Houston, 3 Sergt. & Rawle, 184; Brudenell *v.* Vaux, llas, 302; Com. *v.* Chambre, 4 Id. 143; Sheets *v.* Selden, 2 Wallace, 190. And note the Act of March 3, 1875, (applied to military cases :. O. 64 of 1875,) in regard to credits for good conduct of five days each and every calendar month," &c.

In a case in G. O. 64, Dept. of the Cumberland, 1868, a sentence ıtand on a barrel three hours each day,' without adding the number ys, was properly, held to be enforceable for one day only.

See cases of variance inducing a disapproval of the proceedings, red to in DIGEST, 477; also cases in G. O. 6, Dept. of La., 1868, e the christian name of the accused was given as *James* in the speci- on and *John* in the sentence; and case in G. C. M. O. 117, Mil. Div. ic & Dept. of Cal., 1881, where the same appeared in the specifica- and finding as *James W. F.*, and in the sentence as *William H. F.* ere difference however in a middle initial is held to constitute no nce. DIGEST, 477, and authorities cited in note; also Keene *v.* le, 3 Peters, 1; Gaines *v.* Stiles, 14 Peters, 322; Lessee of Dunn *v.* es, 1 McLean, 321.

Where this is not done, it is in general to be inferred, and in our nt practice *is* inferred, that the punishment first mentioned is the ıtended to be first executed. See DIGEST, 234.

of a court-martial shall be, in every case, an *entirety;* that is
say that there shall be but a single sentence covering all the co
victions on all the charges and specifications upon which the a
cused is found guilty, however separate and distinct may be t
different offences found, and however different may be the pu
ishments called for by the offences.[1]

**Not to State the Vote, except in a case of Death Se
tence.** Although not required by law—by Art. 96 or otherwise
it is the uniform practice to add to a capital sentence that t
same is concurred in by two-thirds of the court. But in no oth
case can the vote be stated in the sentence; nor can it be stat
that the vote was unanimous, without a violation of the member
oath prescribed by Art. 84.[2]

Sentences to be Separate for Joint Accused. Where se
eral persons are charged and tried together for the same offe
or offences, and all, or more than one, are convicted, separ
entire sentences should be adjudged to each, precisely as if th
had been separately tried. Different punishments may, and, wh
the measures of their criminality are materially different, shou
be imposed upon the several individuals, but, even though th
same punishment be awarded to each, the sentences—like th
finding—should be formally distinct.[3]

Cumulative Sentences, How to be Framed. Where
person, while under sentence of imprisonment, is again broug
to trial and sentenced to a further measure of the same puni
ment, it is usual in the civil practice for the sentence to specif
that the second imprisonment is to begin at the expiration of th
first, indicating the date of such expiration.[4] At military la

1. As to the civil practice, see Wharton, C. P. & P. § 910, 911;
Bishop, C. P. § 1325–1334.

2. See similarly as to the statement of the Finding, in Chapter XI

3. Where there are joint defendants, the sentence should be "in for
several, not joint." 1 Bishop, C. P. § 1035. And see Wharton, C. P
& P. § 312, 314; U. S. v. Ismenard, 1 Cranch C. 150; Simmons § 6
A joint sentence, where all are alike convicted of the same offence o
offences, would indeed be *legal* and operative at military law, thoug
irregular and exceptional as to form.

4. See Wharton, C. P. & P. § 932; 1 Bishop, C. L. § 953.

er, it is not habitual, nor is it necessary, so to specify,[1] or ise to direct in terms that the second punishment, (of im- ment, forfeiture, or suspension,) is to be executed as addi- to or continuous upon the first. It is sufficient and almost ible to frame such punishment in the usual form, as an ndent sentence; the mere fact that a similar sentence is g and being executed at the time determining of itself that ond sentence is to be treated not as concurrent but as a dis- dditional penalty of which the execution is to commence he completion of the first, *i. e.* when the same is terminated due expiration, or by a remission or other action on the the reviewing or other superior authority. The second e is thus made cumulative simply by operation of law.[2] ay be added that a punishment, to be cumulative, must be pable of being independently executed. Where a court- l has imposed upon an accused a penalty which, from its cannot be executed more than once, as dishonorable dis- or forfeiture of all pay, and such penalty has been ap- and has taken effect, it will be futile and superfluous to it in framing a subsequent sentence. In such a case, the vill, in the first instance, have exhausted its power over the , so far as concerns the particular penalty.[3]

Sentence should not embrace Penalties resulting eration of Law. Thus the sentence of a deserter need l should not contain a direction to the effect that he make e time lost by his unauthorized absence,[4] or that he in- forfeitures specified in the Army Regulations,[5] or that he

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ecent instances in which it was done in the sentence are found . M. O. 24, 39, Dept. of Cal., 1885.

GEST, 288–9, 449–450. The legal effect will be the same where ier has been twice successively tried, and has received at each erm or quantity of the same punishment, but the first sentence been promulgated as approved, or has not commenced to be d, at the date of the second sentence. Here the second sentence, pproved, will be cumulative upon the first. See par. 902, Army ontaining ruling of the Sec. of War in concurrence with a pre- inion of the Judge Advocate General.

e case in G. O. 10, Dept. of W. Va., 1862.

O. 94, Dept. of the Mo., 1867; Do. 21, Dept. of the Lakes, 1873; . O. 74, Dept. of the East, 1873; DIGEST, 21–22. It was formerly *tra.* G. O. 45 of 1843.

GEST, 270; U. S. *v.* Landers, 92 U. S., 79. The special regu-

be subjected to the loss of civil rights prescribed by the stat law;[1]—the same being all penal consequences attaching upon t (approved) conviction, independently of the sentence. So, i convicting an officer under Art. 6 or Art. 14, (providing for t punishment of false musters, &c.,) it is not essential to add, i connection with the dismissal to be adjudged, that the accu be disabled from holding office or employment in the pub service, since this disability must necessarily result from the ju ment of the court.

V. THE SPECIFIC PUNISHMENTS SEPARATELY CONSIDERED.

These will be presented in the following order:—I. Puni ments legal and appropriate for officers: II. Punishments le and appropriate for both officers and enlisted men: III. Puni ments legal and appropriate for enlisted men only.

I. Punishments Legal and Appropriate for Officers.

These are Dismissal or Cashiering, Disqualification for of Suspension, Loss of relative rank or files, Reprimand or Adm ition, and Apology.

Dismissal or Cashiering. Dismissal and cashiering we formerly regarded as quite distinct in military law; the latt involving, in addition to a dishonorable separation from the serv ice, a disability to hold military office and thus constituting more severe punishment than the former.[2] The two are n

lations referred to are pars. 215, 220, (as amended by G. O. 68 of 188 2456 and 2458.

1. By Secs. 1996, 1998, Rev. Sts. See Digest, 225; G. O. 170, S teenth Army Corps, 1863.

2. McNaghten, 12–16; Hough, 123–130; Maltby, 89, 92; O'Brie 274–5; II Opins. At. Gen., 289; Digest, 141; G. O. 17, Dept. of Fl 1866. Note also case in James, 377, and Simmons § 116, in which a se tence of cashiering was *mitigated* to dismissal.

A form of this punishment in Arts. 9 and 10, (Sec. I,) of Charles I, is to be "cashiered the army without pay or passport." In Art. 165 the Code of Gustavus Adolphus is a peculiar provision, that a "super officer" who "shall *sollicite* for any man that is lawfully convicted" a court-martial, "unlesse it be for his very neere kinsman for whom n ure compels him to intercede, * * * shall be held as odious as th delinquent and *cashiered from his charge.*"

ified as separate punishments in the British Army Act,[1] but ır law and practice all such distinction has long ceased to , cashiering having become identical with dismissal.[2] In all ›resent Articles of war in which this punishment is named pt two—the 8th and 50th—"dismissed" is the word adopted, in those "cashiered" was retained apparently through inad- :nce. In sentences of courts-martial, as also in the common :ary parlance, "cashiering" or "cashiered" is now most y used, and "*dismissal*" will therefore be here exclusively loyed in treating of this punishment.

ismissal by sentence, it need hardly be observed, is simply xpulsion of the officer from the military service, carrying it *no legal disability*.[3] A dismissed officer is not as such ualified to hold either military or civil office:[4] disqualifica- for office is, in our military law, as will hereafter be noticed, ›arate and distinct punishment.

ismissal, to the exclusion of any other punishment, is *re- ed*, by Arts. 5, 6, 8, 13, 15, 18, 26, 27, 28, 38 and 50, to be ad- ;ed upon conviction of the offences in these Articles specified. ; also *legally imposable* upon conviction of any offences of :h the punishment is made discretionary with the court, and therefore be adjudged under any of the Articles, other than e last named, which relate to the offences of officers—except Art. 57 which enjoins, exclusively, the death penalty.

orm of the sentence. The proper *form* of the sentence is— be dismissed," or "to be dismissed the service," or "to be dis- ed the service (or 'military service') of the United States." term "dishonorably," though sometimes employed, need be expressed, the notion of dishonor being necessarily in- ed in a dismissal by sentence. Nor, as it has already been :ed, is it proper to add—"and he is hereby dismissed accord-

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Sec. 44.

De Hart, 194; Benét, 44; G. C. M. O. 103 of 1875; DIGEST, 141,

It entails merely, where adjudged on conviction of cowardice or , and after the sentence has been published as indicated in Art. he loss of the privilege of associating with officers of the army.

DIGEST, 238–9. And see Sec. 1228, Rev. Sts. It is otherwise as *val* officers, who, when dismissed by court-martial, cannot again re- the navy as officers. Sec. 1441, R. S.

ingly," since it is not the sentence that dismisses or can dismi the officer, but the approval, or confirmation, of the reviewi authority.

When the dismissal is "for cowardice or fraud,"—as where is adjudged on conviction of misbehaviour before the enemy violation of Art. 42, or of some offence to the fraud of the Unit States, as presenting a fraudulent claim or embezzlement, in vi lation of Art. 60,—the sentence should "further direct" in gard to the publication of the crime, punishment, &c., as is p scribed in the 100th Article.

Execution of this punishment. This punishment is e ecuted, by operation of law, immediately *upon approval or c firmation, and notice* to the officer. Upon the day of the offic announcement to an officer of the approval or confirmation by t proper authority of a sentence dismissing him from the milit service, his connection with the army at once ceases and he b comes a civilian. In some instances the day of actual notice w be the same as that of the final action giving effect to the se tence. In most cases, however, especially in time of peace wh sentences of dismissal are required to be confirmed by the Pre dent at Washington, a certain period, often considerable, will general elapse after the date of the confirmation and its promu gation in General Orders before the officer can be officially in formed of the same. In such cases, the general rule is that th sentence shall be considered as taking effect on the day on which the Order, in and by which the sentence is thus confirmed, promulgated at the post or station at which the officer is servi or held in arrest.[1] All military persons are in general bound take notice of General Orders officially promulgated at the stations;[2] and, in the absence of evidence to the contrary, officer will be presumed to have been informed of an Order, co firming a sentence dismissing him from the service, on the d on which the same was published or received, at his post or st tion.[3] It may happen, however—and this especially in time war—that, on the day of promulgation or receipt, the officer m

1. See the general rule as stated in G. O. of Jany. 14, 1831, and D 103 of 1864, and illustrated in G. C. M. O. 20 of 1874; Do. 42 of 18 DIGEST, 236, 350–1.

2. See G. O. 2, Dept. of Va. & No. Ca., 1865; O'Brien, 85.

3. DIGEST, 351; O'Brien, 85.

voluntarily absent so that he cannot in fact take notice of
)rder. Thus he may be absent on some duty upon which,
;ularly or because of some emergency,) he has been ordered,
may be absent sick in a distant hospital, or may be a pris-
in the hands of the enemy. In cases of this character,
of the fact of absence will rebut the presumption indi-
, and the officer will, properly, not be charged with notice
e confirmation of the sentence, nor will his dismissal take
, until *actual* official notice of the same as confirmed is given
m.[1]

e phrase, sometimes added to the official approval of a dis-
ıl, as published in General Orders, that the party 'ceases to
officer of the army from the date of this order,' is surplus-
being no proper part of the action required, and of no legal
in fixing the date on which the dismissal goes into opera-
The dismissal does or does not take effect at the date of
rder according as the officer may or not receive official *notice*
e same on its date.

need hardly be added that, even where a considerable delay
without fault of the reviewing officer, occurred in acting
a sentence of dismissal, the same cannot legally be made,
e order of that officer, to take effect as of a date *prior* to that
s final action,—as of the date, for example, of the actual
lging of the sentence by the court.[2]

smissal with ignominy. In time of war, courts-martial
sometimes directed in sentences of dismissal that the same
companied by certain minor penalties impressing the dis-
l with an ignominious character—such as taking away or

)IGEST, 236, 351–2. And compare Simmons § 788; also Allstaedt
S., 3 Ct. Cl. 290, where an executive order of dismissal was held to
aken effect, not at its date, but at the subsequent date of its re-
)y the officer at his station. So, in Gould *v.* U. S., 19 Ct. Cl. 593,
ıse of an officer of volunteers mustered out and discharged during
e war, but who did not receive notice of such action till at the end
e months, it was held that his discharge did not take effect till the
reached him. Note also the similar principle incorporated in the
ırt. of war, and recognized in Mimmack *v.* U. S., 97 U. S. 426;
r *v.* U. S., 6 Ct. Cl. 35; G. O. 103 of 1864,—that an officer's *resig-*
takes effect not at the date of the order accepting it, but at the
ın which he is officially notified of such order. Compare also G.
of 1880.

)IGEST, 237. And see Allstaedt *v.* U. S., *ante.*

breaking the sword of the officer, or cutting off his shoulder stra or other *insignia* of rank, publicly in presence of the comma to which he is attached.[1] In a few cases, upon conviction misbehaviour before the enemy, it has been directed in the se tence that the officer be paraded in front of the command bea ing a placard inscribed with the word "coward,"[2] and furth even that he be drummed out of the service.[3]

Such additional penalties are commonly executed through t officer of the day or adjutant, after the reading of the order p mulgating the approval of the dismissal, at a parade or on so other occasion of the formal assembling of the command.[4]

Disqualification for Office. This punishment, though merly, by a provision of the British Mutiny Act, specifically galized in cases of embezzlement and some offences of a simi nature, ceased subsequently to be thus authorized,[5] and is not cluded in the list of legal punishments contained in the pres Army Act.[6] In the American civil courts, disqualification hold office seems to have been recognized as a common-law pu ishment for treason,[7] but does not appear to have been employ in other cases except where expressly authorized by statute.[8] sundry U. S. statutes,[9] disqualification or ineligibility for off

1. See cases in G. C. M. O. 61, 117, 285, 315, 332, of 1865; G. O. Mountain Dept., 1862; Do. 9, Dept. of the Cumberland, 1862; Do. 60, Army of the Potomac, 1863; Do. 19, 27, Id., 1864; G. C. M. O. Id., 1865; G. O. 3, Dept. of W. Va., 1863; Do. 73, Dept. of Va. & No Ca., 1864; Do. 29, Dept. of the Gulf, 1864; Do. 43, Dept. of La., 186 Do. 8, Dept. & Army of the Tenn., 1865; G. C. M. O. 19, Dept. Ky., 1865.

2. G. C. M. O. 332 of 1865; G. O. 19, 27, Army of the Potomac, 186 Do. 73, Dept. of Va. & No. Ca., 1864.

3. G. O. 73, Dept. of Va. & No. Ca., 1864. In a case in G. O. Dept. of the Cumberland, 1862, it was directed in the sentence that the officer, after being publicly stripped of his *insignia* of rank, be "con ducted by the guard without the lines of the command."

4. See Order last cited; also G. O. 25, Mountain Dept., 1862.

5. Simmons § 668.

6. Sec. 44.

7. Barker *v.* People, 20 Johns. 451.

8. Com. *v.* Jones, 10 Bush, 725; Brackett *v.* McCarty, Id. 758.

9. Revised Statutes, Secs. 243, 1229, 1441, 1734, 1781, 1782, 1788, 17 2105, 2233, 2873, 3167, 3890, 4187, 4188, 4373, 4374, 5332, 5334, 53 5408, 5449, 5499, 5502, 5508, 5532. The disabilities attached by Se

n imposed not as a punishment but as a legal consequence moval from office or conviction of crime in cases of civil

ır military code, disqualification, (except as it may at an :riod, have been involved in cashiering,) has never been ılly authorized as a distinct punishment, though in some ,rticles—the present 6th and 14th for example, it has been l as a legal consequence to the sentence of dismissal. :hority therefore for disqualification as a military punish- ; sentence must rest upon *usage*.

:ase of a contractor tried in 1865 by a naval court-martial, :he Act of July 17, 1862, s. 16,) and sentenced to be ex- rom thereafter contracting for naval supplies, the Attorney , in pronouncing against the legality of this sentence, ; generally :—"A sentence of incapacity or disability does n to fall within the range of discretionary punishments le by the usage of the service."[1] As a general proposition, r, this statement of the law is too broad.[2] In a previous Order of the Navy Department,[3] disqualification for office he United States had been expressly recognized as an :ed punishment for naval courts-martial, and in the *army* series of precedents had given sanction to this form of Prior to the late war, indeed, this punishment, though ne to time imposed, was not a common one.[4] From an te, however, in the war it was frequently resorted to, and, ıg the period from that date to March, 1870, (in which t was imposed and approved in two instances,) the author d some one hundred and twelve cases published in Orders, h this penalty was adjudged by court-martial in connec-

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)8 to convictions for *desertion* have been elsewhere remarked

early case mentioned in 2 Journals, 204, (1777,) Congress, in ly dismissing 12 Lieutenants of the Navy, rendered them at the ıe "incapable of holding any commission or warrant under the ; of the United States."

I Opins. 528. (1868.)

d the ruling been confined to the sentence in the particular case scarcely have been subject to exception.

O. 44 of 1864.

: cases cited and remarked upon in author's note to DIGEST, 244.

tion with dismissal;[1]—the disqualification pronounced being in most cases *general*, *i. e.* not confined to the holding of *military* office merely, but extending to the holding of *any* office under the United States.

In a case, however, published in a General Order of April, 1870,[2] the punishment of disqualification, (included by the court in its sentence,) was disapproved as "unauthorized by law;" and the same action was repeated in a case of a similar sentence in December following.[3] Since the last date the punishment under consideration is not found to have been embraced in any sentence published in General Orders.

The disapproval in these cases is understood to have been induced by the ruling of the Attorney General above cited. But this ruling, as has been seen, was not properly applicable at least to sentences of disqualification in the army, and so far as usage and the practice of the Government could sustain such sentences, the same must be regarded as having been fully and amply sanctioned in our law.

But while this punishment has thus been sanctioned, and is one which might profitably be resorted to in aggravated cases of embezzlement, gross malfeasance in office, or other extreme offence exhibiting the offender to be quite unworthy to serve the United States at least in a military capacity, it is yet to be observed that the same, even though it were confined to military office only, would always remain objectionable as practically amounting to an inhibition for an indefinite period upon the appointing power of the Executive in the case of the officer, and thus constituting an exercise of authority apparently beyond

1. See the numerous cases collected in the author's note to DIGEST, 244-5. Those published, and approved in the Orders cited of the War Dept., included such leading cases as those of Maj. Gen. Porter, Brig. Gens. Hammond and Briscoe, B. G. Harris, M. C., &c. In the case of the former, the disqualification imposed—"to be forever disqualified from holding any office of trust or profit under the Government of the United States"—was further recognized as legal by being expressly *remitted*, as a continuing punishment, by the President in 1882.

It may be added that disqualification could rarely be an appropriate punishment for an *enlisted man*. In one instance, in G. C. M. O. 98 of 1867, in which a soldier was sentenced, with confinement, "to be forever disqualified from holding any office above the rank of private in the U.S. army," this part of the sentence was very properly disapproved.

2. G. C. M. O. 22, H. Q. A.

3. G. C. M. O. 57, Id.

province of a court-martial. Were the disqualification lim- ı to a certain term of years, as in some militia cases,[1] and the ıroval of the President required, as in cases of dismissal, to e the punishment legal effect, the objection indicated would mainly done away with.

Execution. This punishment is executed in the same man- r as dismissal, *i. e.* upon *official notice* of the approval of the ıtence by the President or proper Commander, as given either the formal order of promulgation of the proceedings, or other- se. Upon the date of such notice the disqualification is com- :te, and thenceforward continues to be in force till removed by e pardoning power.

Suspension. This punishment, (no longer authorized by the itish code,[2]) is imposable in our service for any offence of an icer[3] of which the penalty is discretionary with the court. ıough *recognized* in one of its forms—suspension from com- ınd—by the 101st Article of war,[4] it in fact rests for its au- ority upon *usage.* It may be adjudged for any stated term of onths or years.

Kinds of suspension. There are properly but two kinds of spension of officers—suspension from rank and suspension from mmand. The former indeed includes the latter; that is to say, suspension of an officer from rank includes a suspension from ch right of command, (and exercise of authority and perform- ıce of duty incident thereto,) as may be attached to his rank.[5] Suspension from the service" is a form which was once some-

1. See Militia Reporter, 145; Printed Trial of Maj. Gen. Goodale, lass. militia;) Printed Trial of Capt. S. Watson, *et al.* (Id.)

2. See Army Act, s. 44.

3. Suspension from rank (and pay) of *non-commissioned officers* was one time known to the British practice, (Simmons § 126; McNaghten, -37,) but is no longer authorized. (Army Act § 44.) In a few rare ıtances in our service, of which the latest known is a case in G. C. M. O. , Dept. of the East, 1872, non-commissioned officers have been sen- ıced to suspension, but such punishment has no sanction in usage, l is not recognized in the Army Regulations, par. 896.

.. As also in Sec. 1326, Rev. Sts., relating to cadets of the Military ıdemy.

. DIGEST, 468. And see O'Brien, 275.

times employed as substantially equivalent to suspensio rank but is now disused. "Suspension from duty" is more frequently resorted to in the navy[1] than in the n practice.[2] "Suspension from the Military Academy" is ishment applicable to cadets, and which has the effect of ing the party from the service as a cadet during the te judged.[3] The '*suspension from pay*' indicated in Art. 101 properly suspension in the legal sense but forfeiture. T for the term is not merely *withheld*—the right to receiv not merely suspended or placed in abeyance—but the s absolutely forfeited precisely as in any case of a forfeitu pressed as such in the sentence.[4] In suspending, howev officer from command, a court-martial, in view of the pro of the Article, is not, as it is held, empowered to suspend, (i. feit,) his pay for a period longer than the term of suspensio command.[5]

Suspension from rank. This punishment involves privation, during the period of the operation of the sen not only of the right of command but of all other right privileges incident to the rank, as such, of the officer, wl held in his relation to other officers or to enlisted men. T deprives him of any right of promotion accruing during th of suspension to which he would have been entitled had h been suspended, and causes the same to accrue to the office junior.[6] It also deprives him of the right of priority an cedence in the exercise of the minor privileges of the offi the privilege of the selection of quarters where quarters h be selected anew pending the term of suspension.[7] And any other right or privilege of priority, obedience, or defe which would otherwise have been due to his rank; the

1. See Naval Regulations, Art. 32, s. 2; Harwood, 134–5.

2. It appears in Gen. Swaim's Case, G. C. M. O. 19 of 1865.

3. Where the suspension is for a considerable term, it is usually in the sentence that at the end of such term the cadet shall join th lower class. DIGEST, 471.

4. DIGEST, 470.

5. It was originally so held, in a case arising under a correspo naval article, in IV Opins. At. Gen., 324.

6. McNaghten, 21; O'Brien, 275; G. O. of Jan. 23, 1811; D 399, 468.

7. DIGEST, 469. And see *post*.

ith its incidents, remaining, during the term of the suspension, ormant and inoperative.

But rights incident to his *office*, independently of rank, he may ill enjoy.[1] Thus his right to rise relatively or in files in his rade, (where a senior dies, resigns, or is dismissed, retired, or romoted,) is not affected by the suspension, this being a right ncident to his *office*, according to the date of his commission.[2] So, he may continue to occupy his proper quarters, (where no new selection of quarters involving him is required at his station,[3]) to purchase fuel, commissary stores, &c., from the proper officer, to draw his pay,[4] (where the same is not expressly forfeited n the sentence according to Art. 101,) to receive his pecuniary or other allowances, &c.[5]

Suspension from command. This punishment merely deprives the officer of authority to exercise his proper military command, (devolving it upon his junior or some other officer specially assigned to the same,) and consequently of his right to give orders to, or exact obedience from, his inferiors, to convene the courts and boards which he would be empowered to convene by virtue of his command were he not suspended, to appoint or reduce non-commissioned officers, to grant furloughs, make arrests, &c. It does not affect his right of promotion, or any military rights or privileges incident to rank or office or other than those attaching simply to command as such.[6] It is thus not in general an appropriate punishment for a staff officer. It is also evidently considerably less severe punishment than suspension from rank.

Suspension in general. Suspension—it may be added—is not dismissal nor any degree of dismissal. It does not divest the officer of his office or commission, but only holds in abeyance the rights and functions attached to his rank or command.[7] Though

1. DIGEST, 468. As to the effect of suspension upon the *office*, see further *post*.

2. DIGEST, 468.

3. Where the quarters occupied by an officer under suspension from rank are selected by a senior, he must take such quarters as may be assigned him by the proper commander. See DIGEST, 469.

4. IV Opins. At. Gen., 444; VI Id., 203; DIGEST, 269.

5. McNaghten, 27; DIGEST, 470.

6. See DIGEST, 468, 469.

7. "Suspension from rank, though it has the effect of depriving an

pending the term of suspension he is not in a legal capacity to receive or execute orders pertaining to his military specialty, he yet remains subject to such orders as may properly be given him in his official or personal character, irrespective of rank,[1] as well as amenable to the jurisdiction of a court-martial for any military offence committed during such term.[2] The term being completed, he reverts to his former rank,[3] as well as to his command if not meanwhile legally divested by superior authority. In the interim however he may be restored by the pardoning power, and his promotion by the appointing power will operate as a pardon and terminate the suspension.[4] So the ordering of him by competent authority, (the officer who approved the sentence, his successor in command, or his authorized superior,) to resume command or to perform a duty incompatible with the terms of his suspension, will properly operate as a constructive pardon and relieve him from further punishment.[5]

Suspension, also, is not *arrest*, and does not, *per se*, authorize a

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officer for the time of his rank, and putting a stop to the ordinary discharge of his military duties, does not void his commission, annihilate the military character, or dissolve that connection which subsists between him and the sovereign." Tytler, 126. And see Id. 316. "It may be considered as borrowed from the ecclesiastical jurisdiction which admitted suspension as a minor excommunication." Sullivan, 88. Suspension is not expulsion; and the officer, although suspended, remains, in legal contemplation, on the establishment, although his capacities for service are for the time gone." V Opins. At. Gen., 740. And see VI Id., 715; Hough, (P.) 710; McNaghten, 20–21; Maltby, 33; De Hart, 56; DIGEST, 468.

1. Thus an officer under suspension may be ordered to change his station. So, he may be required to attend a court-martial as a witness. VI Opins. At. Gen., 714. In neither case is the status of suspension affected.

2. "An officer, though under suspension, does not cease to be an officer, subject to the military law and, in all things lawful, subject also to the order of the President." VI Opins. At. Gen., 715. And see Sullivan, 88; Tytler, 126–7; Hough, (P.) 710; McNaghten, 26; De Hart, 56; DIGEST, 468, 470; also case, in G. C. M. O. 12 of 1878, of an officer tried for and convicted of drunkenness while under a previous sentence of suspension. The suspended officer would indeed be liable to trial and punishment if he wilfully assumed to exercise any of the rights or functions of which his sentence of suspension had divested him.

3. "At the expiration of the term of suspension he becomes a perfect man again." Sullivan, 88. And see McNaghten, 27; DIGEST, 471.

4. IV Opins. At. Gen., 8.

5. Tytler, 126; McNaghten, 22; VI Opins. At. Gen., 715.

commander to subject the officer to bodily restraint.[1] Courts-martial indeed sometimes add to a sentence of suspension that the officer shall remain confined to the limits of his post or station pending the period for which he is suspended.[2] In the absence of such direction, the officer, though not *entitled* thereto, has sometimes been allowed, upon application, to have a leave of absence for the period of the suspension.[3]

Suspension as a punishment in practice. Suspension has been viewed by some authorities as an objectionable punishment for the reason that it withdraws an officer from use and service while yet retaining him in the army—an abnormal and embarrassing status.[4] In the British law, loss of relative rank has been substituted for it.[5] In our present practice, however, suspension remains a not unfrequent and apparently a generally approved form of punishment.[6] It is also resorted to as an appropriate minor penalty to which may be commuted a dismissal when the latter is deemed too severe a punishment.[7]

Execution of this punishment. As to its mode of execution, suspension, like dismissal, is executed, or rather commences to be executed, upon *notice* to the officer of the due approval of the sentence. From and after the date of the order promulgating the approved sentence if communicated to him upon its date, or the subsequent date upon which such order, or

1. DIGEST, 469.

2. As to the expediency of this form of the sentence, see G. O. 4 of 1843; Do. 68, Navy Dept., 1865.

3. DIGEST, 469. In G. O. 42, Dept. of Washington, 1866, a regimental quartermaster, sentenced to suspension from rank for six months, is "permitted," by the Dept. Commander, "after turning over all property and moneys in his hands, to leave the department during the period of his suspension."

4. See Simmons § 115, note; De Hart, 55–58; Benét, 39; G. O. 43 of 1852. As to the injurious effect of the exceptionally protracted suspension in Gen. Swaim's case, see remarks of President Arthur in the G. C. M. O. noted *post*.

5. Army Act, s. 44. See "Loss of relative rank or files," *post*.

6. In the recent case of Gen. Swaim, (G. C. M. O. 19 of 1885,) a sentence—"To be suspended from rank and duty *for twelve years*, and to forfeit one half his monthly pay every month for the same period," was finally approved by the President.

7. In which case the status of the officer is the same as if originally sentenced to a suspension for the same term. DIGEST, 470.

other official information of the approval, is actually personally made known to him, the term of the suspension begins, and runs on to its end.

Loss of Relative Rank or Files. This species of punishment, in substance legalized by the British code,[1] is, with us, sanctioned by the established usage of the service.[2] In our practice the punishment consists simply in subjecting the officer, if a *line* officer, to lose a certain number of "files" or "steps" in the list, or to be placed at the bottom of the list, of officers of his rank in his regiment, arm, or corps. In resorting to the milder form of the punishment, the position on the list intended to be assigned the offender is in general specifically indicated by designating the inferior *number* which he is in future to have, or by some such addition as—'so that his name shall appear (or be borne) on the Army Register next below (or above) that of A. B.,' (a certain officer named.)

The effect of this punishment is to deprive the officer of such relative right of promotion, as well as relative right of command and of precedence on courts or boards and in choosing quarters, &c., as he would have had, had he remained at his original number. It cannot, however, affect his right to pay or allowances.[3]

Like suspension, this punishment has, in some General Orders,[4] been declared to be an objectionable one, on account of the inequality of its effect upon the other officers in the list.[5] But, like suspension also, though less frequently adjudged, it holds its place among the approved minor punishments for officers. It may, however, in some cases operate with more severity than suspension, since, unlike the latter, it has no fixed term but is a "continuing" punishment subsisting till removed by the pardoning

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1. It is designated in the Army Act, s. 44, as—"Forfeiture of seniority of rank in army or corps or both."

2. DIGEST, 311–312. And see XII Opins. At. Gen., 547.

3. DIGEST, 312; XII Opins. At. Gen., 547–8.

4. See G. C. M. O. 25 of 1873; Do. 2, Dept. of Dakota, 1873. But in G. O. 43 of 1852, a preference was expressed for it over suspension, by the Secretary of War.

5. See further, in DIGEST, 312.

:r.[1] As remarked of suspension, it is sometimes resorted to ray of commutation for a more severe penalty, as dismissal.[2]

xecution of the punishment. This punishment, like dis- al and suspension, begins to be executed and to take effect at from the date of the Order promulgating the approved sen- e, or the date of the personal and official *notice* to the officer he due approval of the same.[3]

eprimand or Admonition, and Apology. Reprimand ie of the punishments enumerated in the Army Regulations, 896,) as legal for *enlisted men.* Inasmuch, however, as it is : rarely adjudged offenders of this class, and is especially ap- riate for cases of officers,[4]—it is preferred to consider it in connection. This punishment is in terms recognized as a penalty for officers by the British code,[5] and in our law is sable by usage whenever the sentence is discretionary with court. Though usually awarded for offences deemed mate- r excusable,—as where the offender has acted without bad ve, or upon a misconception of law or fact, or under extreme ocation,[6] &c.,—and intended as a light penalty,[7] it is yet one hich the quality must necessarily be left to the discretion of uthority who executes it.

court-martial, in imposing a reprimand, may direct that it

XII Opins. At. Gen., 547; DIGEST, 311, 358.

In G. G. M. O. 21 of 1868, a sentence of cashiering is commuted he following terms:—"That he," (naming the officer,) "shall be ed at the foot of the list of second lieutenants, forfeiting all rank and ms and privileges arising from services rendered previous to the date he promulgation of this sentence." The statement, however, of the *equence* of the action is of course surplusage. In a recent case, in C. M. O. 53 of 1883, a sentence of dismissal is commuted (in part) to— eduction in lineal rank to the foot of the list of lieutenant colonels of alry."

See "Execution of punishment of dismissal," *ante.*

. That reprimand is not a regular or appropriate punishment for en- d men, see Harcourt, 171; Hughes, 94; Bombay R., 37; Macomb, G. O. 31, Dept. of the N. West, 1864; Do. 149, Dept. of the Gulf, ; Do. 7, Dept. of Arizona, 1870.

It is designated as "Reprimand, or Severe Reprimand." Army s. 44.

See Trial of Capt. S. Watson, (Mass. militia,) p. 100. (1811.)

Maltby, 96.

be either *public* or *private*,[1] according as it is contemplat it shall be administered in public before the command[2] c lished in General Orders, or shall be given by way of p reproof by the commanding officer in the absence of wit Sentences of private reprimand, though once not unusu now most rare in practice. The more frequent form of t tence is—"to be reprimanded in General Orders," or "to rimanded" simply. A designation of the authority by the reprimand is to be administered is sometimes added, a the general commanding,' 'by the Secretary of War,' &c. however is not necessary, the duty properly devolving in a upon the legal reviewing authority—the officer who co the court or his successor for the time being.[4] This officer be designated, if any one:[5] for the court indeed to designa *other* officer as the person to execute the sentence would regular and unauthorized,[6] and such action would prop disregarded: the best form is to make *no* designation.

Further, the court in its sentence cannot properly direc the terms of the reprimand, nor as to the time or place at it is to be given.[7] These are matters which belong to th ince of the reviewing officer.

Admonition is but a milder form of reprimand.[8] A se "to be admonished" is an indication that the court dee

1. Adye, 221; Tytler, 317; Simmons § 115, 670; Maltby, 97; M 61; O'Brien, 275; De Hart, 194.

2. In the early case of Col. Debbiegg, (2 McArthur, 383,) th sentenced the accused "to be reprimanded in open court," and th mand was thereupon administered by the president of the court. a form is now unknown.

3. See instances of sentences "to be *privately* reprimanded" i 45, Dept. of Washington, 1863; Do. 13, Dept. of Va., 1866; Do. Dept. of the East, 1867; and in the published naval Trials, in Capt. Gordon, (p. 440,) and Capt. Hull, (p. 474.)

4. See DIGEST, 428.

5. G. C. M. O. 83, Dept. of the Mo., 1871.

6. In a case in G. O. 15 of 1852, in which a court, convened b partment commander, sentenced an accused "to be reprimar Orders from the War Department," it was held by the Secre War that the court could not properly remove the execution sentence from the department commander, who was the legal re officer, to the War Department, and that the sentence was then this respect irregular.

7. Simmons § 670; Tytler, 317; Maltby, 97; Macomb, 62.

8. Other forms of this sentence which have been resorted to

fence to be one of a comparatively trivial character.[1] To sen-nce an officer, convicted of a serious offence, merely to be repri-nded or admonished, is a mockery of justice.[2]

Execution of the punishment. In cases of light offences, has been a not unusual form for the reviewing officer, in ap-oving the sentence, to add in the order:—"The publication of is order will be a sufficient reprimand," (or "admonition,") in terms to such effect; this constituting the entire execution the sentence.[3] In cases of more serious offences, the order mmonly proceeds to administer a specific reprimand; and in me marked precedents very severe reprimands, in the course of hich the merits of the case are reviewed and commented upon, ve been pronounced and promulgated to the army.[4] In a few stances the reviewing authority has directed that the reprimand administered by an inferior commander. *Private* reprimands e executed in such form and at such time and place as the proving authority may in his discretion select.

Apology. Courts-martial have sometimes required in sen-nces that the accused make an oral apology, generally in public, another military person, commonly a superior, for disrespect-l words, unjust imputations, or other personally offensive and proper language or conduct.[5] The sentence, however, may

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vice may here be noticed—as: "to be severely reprimanded," G. O. Dept. of the Tenn., 1863; "to be slightly reprimanded," G. O. 7, my of the Potomac, 1862; "to be reproved," G. O. 5 of 1857; "to censured in Orders by the Reviewing Authority," (the President,) C. M. O. 37 of 1885. In G. O. 51 of 1863, an officer convicted of owing his men to pillage, is sentenced to be publicly reprimanded nd instructed" by the colonel of the regiment.

. See O'Brien, 276. In a recent case in G. C. M. O. 28 of 1880, the tence adjudged on conviction of a slight offence, is—"To be privately monished by the commanding general."

. See cases in G. O. 64, 68, of 1843; Do. 39 of 1845; Do. 21, Dept. the Tenn., 1863; Do. 22, Dept. of the Platte, 1867—in which sen-ces of reprimand, imposed on conviction of grave offences, are disap-ved and commented upon as inadequate.

. G. O. 25 of 1830; G. C. M. O. 19 of 1871; Do. 109 of 1875; G. 5, Dept. of Alaska, 1868.

. As in G. C. M. O. 34 of 1872; Do. 3 of 1873; Do. 20, 21, 36, Navy pt., 1881; Do. 1, Id., 1883.

. Simmons § 670, 671; Hough, (P.) 658; James, 56; O'Brien, 68.

require that the apology be tendered in writing. In some cas the court has dictated the terms in which the apology should b expressed, or directed that it be dictated by a commanding of cer.[1] The British precedents, (which are few in number,) see to be all cases of officers. In our service the precedents ha been nearly all cases in which *soldiers* have been sentenced, i connection with some other punishment, to tender apologies t (or ask pardon of,) *non-commissioned officers.*[2] This punishme however, like reprimand, is regarded as a more appropriate o for officers than for enlisted men.[3] It is now indeed almo wholly disused in practice.

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1. See authorities cited in last note. The most marked case is that Col. Debbiegg, fully reported in 2 McArthur, 383. Here the accus for disrespectful conduct to his commander, the Duke of Richmond, w sentenced to be reprimanded in open court, "and to make his subm sion" to that officer; the court dictating the form of submission apology, in which the accused was caused to 'declare his great conc that he should have made use of expressions in his correspondence w his superior officer which, in the opinion of the court, tended to the pr udice of good order and military discipline.' This apology was re by the accused, in open court, before his commander present as pr ecutor, who thereupon expressed to the court his acceptance of apology, adding—like a true nobleman and gentleman—"*and I pro Col. Debbiegg that he shall never trace in my behaviour any ungenero recollection of this transaction.*"

Samuel, (p. 379,) reports a remarkable case of a British Lieut. Co onel, tried in this country during our revolutionary war, for striking subaltern, and sentenced to suspension; the court adding in the se tence that the junior officer "should draw his hand across the face the Lt. Col., before the whole garrison, in return for the insult he h received."

2. See cases in G. O. of April 24, 1841; Do. 70 of 1864; Do. Middle Dept., 1864; Do. 22, Dept. of the East, 1869. In a furth case, of a civil employee directed to apologize to an officer, in G. C. O. 22, Dept. of Ky., 1865, the apology was directed by the court to made "in the presence of the commanding general of the post."

Cases of sentences *to ask pardon* are few. In James, 58, is one o captain sentenced to ask pardon of the major of the regiment. In O. 45, Dept. of the South, 1862, is a case of a private sentenced, addition to confinement on bread and water,) to ask pardon of a s *tinel*, in the presence of the regiment, for disrespectful language a dressed to him.

In this connection may be noted the provision of the 25th Article war, that a soldier using "reproachful or provoking speeches or g tures" shall be "confined, and required to ask pardon of the pa offended in the presence of his commanding officer;" this per however, being apparently intended to be exacted as a matter of cial discipline without a resort to trial by court-martial.

3. In the case, above cited, in G. O. 5, Middle Dept., 1864, the

PUNISHMENTS LEGAL AND APPROPRIATE FOR BOTH OFFICERS AND ENLISTED MEN.

:he punishments of this class are Death, Fine, Forfeiture and prisonment.

Death. It is provided in Art. 96 that—"No person shall be ıtenced to suffer death except * * * in the cases *expressly ntioned*" in the code. This punishment is so mentioned—t,) in Art. 57, and in Sec. 1343, Rev. Sts., where it is specifily *required* to be adjudged upon conviction, to the exclusion any lesser penalty; (2d,) in Arts. 21, 22, 23, 39, 41, 42, 43, 44, 46, 47, 49, 50, 51 and 56, where it is in terms *authorized* to inflicted at the discretion of the court. In a further Article, : 58th, this penalty, though not *named*, is yet *in effect required* be imposed upon conviction of offences made capital by the al law.

This last article, however, is operative only "in time of war, urrection, or rebellion." So, it is only at a similar period that ıth sentences are, by the provisions of Arts. 47, 49, 50 and 51, l Sec. 1343, authorized to be resorted to. Further, the acts de punishable in Arts. 41, 42, 43, 44, 45, 46, 56 and 57 are ofces which, from their nature, would scarcely be committed ept pending a state of war; and, as to the offences designated Arts. 21, 22, 23 and 39, for which death may at *any* time be udged, these, in time of peace, will most rarely be so aggraed as to induce a court-martial to assign the extreme penalty. e result is that this punishment is, in our military law and ctice, reserved almost exclusively for the purposes of the adıistration of justice in time of *war*. About 550 death sences imposed by courts-martial during the late war are pubıed in the General Orders of the War Department alone.[1]

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e, adjudged a private, to make apology to a corporal "in front of parade," was disapproved, for the reason that it was "one which ld not be executed except by the act of the prisoner, and could only nforced by imprisonment which might be perpetual."

[1] An additional large number appear published in the G. O. of the rent departments and armies, issued during the late war. A further greater number are to be found in the Orders promulgating the prolings of cases tried by Military Commissions, where, however, the ies were mostly civilians. A very considerable proportion indeed ll these sentences were commuted or remitted.

Our code does not prescribe in any case[1] what form of penalty shall be imposed. It would therefore be strictly le a court-martial to sentence simply that the offender be pu '*with death*,' the authority empowered to approve the se thereupon directing as to the mode—shooting or hanging— the usage of the service, in the absence of statutory requir has designated as appropriate to the particular offence. I tice, however, the court invariably specifies the form of th alty, adjudging in general that the accused be *shot* whe victed of desertion, mutiny, or other purely military offen that he be *hung* where convicted of a crime other than m as murder, rape, or the crime of the spy.[2]

It is required by Art. 96 that two thirds of the member court shall concur in a death sentence. It has hence b *usual*, though it is not *essential*, for the court to add to su tence—"two thirds of the members present concurring,' terms to such effect.

Execution. The reviewing authority, on approving t tence, will designate such time and place as the convenie interests of the service may dictate. Where, on account o exigency, it is found impracticable to proceed with the exe at the time named or at the place selected, another time o may at the earliest opportunity be indicated, and the exe legally proceed according to the new designation.[3] By th authority, an inferior commander—as the officer in comm the post, or of the regiment, brigade, &c., at which the p

1. Except as indirectly indicated in Art. 58.

2. Deserters *to the enemy* have sometimes been sentenced to be The death penalty is usually unaccompanied by any other pe the sentence. In a case in an early G. O. of Dec. 9, 1820, the c sentencing a mutineer to be *hung*, add—"and that his body be to the surgeons of the post for dissection." No other such in however, has been met with. An authority similarly to direct, i of persons convicted of murder, was conferred upon U. S. court provision of an Act of 1790, now contained in Sec. 5340, Rev. S a case in G. O. 39, Dept. of W. Va., 1864, tried by a military c sion, the sentence is—"to be hung to a tree and left hanging w inscription, 'Murderer of a Union soldier';" to which is added commission the recommendation "that the building in which th der was committed be burned to the ground."

3. See DIGEST, 79; also case of Coleman *v.* Tennessee, in 9 Reports, 519, and XVI Opins. At. Gen., 349, in which it w that a capital sentence, adjudged a soldier by court-martial i

ield or to which he belongs—may be, and usually is, ministe-
lly charged with the direction of the act of execution.[1]
In the absence of an army regulation prescribing a ceremonial
the execution of a capital sentence, the form may be varied
its details at the discretion of the commander, as the want of
per facilities or the exigencies of the service may require, and,
time of war, the procedure is often materially simplified. Ac-
ding to the general usage, where the death penalty is to be in-
ted by *shooting*, the prisoner, accompanied by the chaplain, is
ducted by a detachment, including a firing party and coffin
rers, and headed by the provost marshal or other officer and
d playing the Dead March, to an open space on three sides of
ich the command is formed facing inwards. The prisoner be-
placed, the charge, finding, sentence and orders are read
id. The firing is directed by the officer, and, the execution
ng completed, the command breaks into column and marches
t the body. In a case of *hanging*, the command is "formed
quare on the gallows as a centre," and, after similar prelimi-
ies, an "executioner," under the direction of the officer in
rge, "performs his office."[2]

Fine. This punishment is specifically designated by Art. 60
the code as a punishment suitable for embezzlement and other
ds upon the government. It is also recognized in Art. 83,
ting to inferior courts-martial, where however it is viewed in
ctice as substantially synonymous with forfeiture of pay. It is
lly imposable wherever the punishment is discretionary with
court, but is especially appropriate to those offences which con-
in a misappropriation or misapplication of public funds or prop-
y, being in general adjudged with a view mainly to the reim-
sement of the United States for some amount illegally diverted
rivate purposes. Where indeed the pecuniary liability of the

5, but not executed by reason of his escape and the pendency of civil
ceedings in his case, might legally be executed in 1879; and this
gh the soldier had meanwhile been discharged from the service.

[1] See Maltby, 104–5.

[2] See Simmons § 759, 760; 2 McArthur, 345–7; Maltby, 104–8; De
t, 247–8. And note in this connection 2 McArthur, 395–6, and
ke's Celebrated Naval & Military Trials, 88, 255, as to the impress-
ceremonial upon the execution of the death sentence in the case of
iral Byng, and in that of Richard Parker, leader in the Mutiny at
Nore.

offender is comparatively slight, forfeiture of pay, as bei readily executed, is a penalty preferable to fine; but c the amount of pay due at the time of the sentence to tl or soldier will in general be quite inadequate to meet siderable obligation. In aggravated cases of embezzle disbursing officers—in whose cases this punishment l mostly resorted to—very heavy fines have been found i to measure the total extent of the spoliation of the tre the convict.[1]

Execution. Fine can in general be effectually execu by means of imprisonment superadded in the sentence as i under the next head. In the absence of any such additic alty, the military authorities cannot of course legally at enforce the fine by any restraint of the person, seizur property, or other forcible act.[2] A fine duly adjudged b martial may, in the opinion of the author, legally be s be collected by a suit commenced in a U. S. court, as m the United States: no instance however of such a suit is in practice.

Fine and Imprisonment. "The ordinary and app common-law punishment for misdemeanor is fine and in ment, or either of them at the discretion of the court."[3]

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1. In cases published in G. C. M. O. 196 of 1864; Do. 187 Do. 21 of 1871, respectively, fines of $35,000, $45,000, and $445, adjudged disbursing officers convicted of misappropriation. A in this connection, cases in G. O. 55, Dept. of Ala., 1865; Do. 8, I where fines, respectively, of $90,000 and $250,000 were imposed tary commissions upon civil officials convicted during the late conspiring to defraud the U. S. of the value of captured cotton

In a recent case, in G. C. M. O. 24 of 1878, where the fine amount of a trust fund justly due from the accused, the court a the sentence—"together with *interest* thereon, from June 1, 1864 of payment; said interest to be computed at *six per cent per an*

2. Orders to such effect were in some cases made, during war; see G. O. 61 of 1865; Do. 71, Dept. of the Mo., 1863; Dept. of the Gulf, 1864.—but were unauthorized as adding to t ishment.

3. 1 Bishop, C. L. § 940. "It is a settled principle that v offence exists to which no specific punishment is affixed by sta punishable by fine and imprisonment. This is so invariably tru all cases where the Legislature prohibit any act without anne punishment, the common law considers it an indictable offence

ry code, the 60th Article makes, specifically, the offences n described punishable "by fine or imprisonment," and, convictions under this, and other articles of the code where nishment is discretionary, the two penalties are frequently ned in the sentence. In the military, as in the civil, pro-e, where a fine is imposed, it commonly is, and in general rly should be, added in the judgment that the party shall prisoned till the fine is paid.[1] But, especially as there is ocess known to the military law by which a convict, desti-f means, can, because of his inability, be relieved from an sonment imposed for the enforcement of a fine,[2] it is usual roper in a military sentence to declare that such an impris-nt shall not exceed a certain term of months or years; other--the pardoning power not intervening—the confinement be indefinitely prolonged. When the imprisonment is led to be inflicted for a separate purpose of additional pun-nt, as well as with a view to induce the payment of the fine, rm commonly adopted is to adjudge it for a certain period ately, and for such further period as the fine may remain d—the latter period, however, not to exceed a certain term ied, or the whole not to exceed a certain term in all.[3]

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to the breach the penalty of fine and imprisonment." Story J., S. *v.* Coolidge, 1 Gallison, 493.

As to the rule in the civil practice, see Rex *v.* Bethel, 5 Mod. 21; op, C. P. § 1301. In G. C. M. O. 27 of 1872, the Secretary of War roves the omission "in the sentence of any direction that the er should be confined until he should have made restitution to the l States of the amount of public money found to have been embez-Without this provision in a sentence there is no means, in the case officer not bonded, of enforcing such restitution beyond the extent pay." And see the earlier G. O. 61 of 1865, on the same subject. ome cases, in directing that the offender shall be imprisoned till e is paid, the court has restricted the period by adding—'abating me at the rate of five (or other number of) dollars *per* day,' or in to such effect. See G. C. M. O. 633 of 1865; Do. 88, Dept. of 1865; G. O., 4 Mil. Div. of the Tenn., 1866. In G. C. M. O. 17, of Miss., 1865, a form of sentence is—to be fined three hundred s, and to be imprisoned "one day for every two dollars of said r any part thereof that remains unpaid."

By Sec. 1042 and 5296, Rev. Sts., provision is made for the dis-e of poor convicts, sentenced by federal courts to be fined and im-ed till their fines are paid.

In this class of military sentences, a provision as to the proportion-atement of the fine is added even more frequently than in the of cases of fine and imprisonment last above referred to. See, for

Imprisonment. This punishment, indifferently also st [illegible] in the military practice, is in terms recognize [illegible] penalty in Arts. 17, 60, 83 and 97, and indirectly in [illegible] further sanctions its imposition by general co[illegible] upon officers[1] as well as soldiers, in all cases in w[illegible] sentence is left to the discretion of the court; confineme[illegible] [illegible], however, being restricted to cases of the [illegible] in Art. 97. Imprisonment, where adjudged to *offi*[illegible] [illegible] invariably combined with dismissal: the party is [illegible] subjected to the confinement as an officer, but as a crim[illegible] [illegible] old rule that a commissioned officer could not prop[illegible] [illegible] imprisoned is thus substantially observed. Where [illegible] *non-commissioned officers*, it is properly accompan[illegible] [illegible] sentence, with reduction to the ranks.[2]

There are five species of this punishment now recognize[illegible] [illegible] law: Simple confinement; Confinement at hard la[illegible] [illegible] confinement in a penitentiary; Solitary confinement; Con[illegible] [illegible] bread and water diet. The two latter, however, ar[illegible] [illegible], as expressed in par. 896, Army Regulations, reserved [illegible] men alone, and will be considered among the pun[illegible] [illegible] appropriate to that class.

Simple confinement. This is either confinement in a gu[illegible] [illegible] imposed for slight offences, or confinement in a milit[illegible] [illegible] Where the latter is imposed, the usual form of the s[illegible] [illegible] in general terms,—'To be confined at such prison,

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[illegible] cases in G. C. M. O. 159, 266, of 1865; Do. 31 of 1866; Do. [illegible] G. O. 22, 38, Northern Dept., 1865. In G. C. M. O. 155 [illegible] sentence imposing a fine of $5000 and a certain term of i[illegible] [illegible] in which it is added that if the fine is not paid at the expi[illegible] [illegible] term, the party shall be confined "one year additional [illegible] [illegible] dollars until it is paid."

[illegible] the British Army Act § 44, authorizes, among the punishme[illegible] [illegible] Imprisonment, with or without hard labor, for a term n[illegible] [illegible] two years."

[illegible] § 687; De Hart, 58, 195; G. O. 11, Dept. of the Cumb[illegible] [illegible] G. C. M. O. 112, Dept. of the Mo., 1871; Do. 33, Dept. [illegible]

[illegible] expressed in the sentence under the form of—'To [illegible] under charge of the guard at his station,' or 'at the post whe[illegible] [illegible] (for a certain period,) or in terms to a similar effect.

[illegible] mild form of "confinement," sometimes imposed, whic[illegible] [illegible] rather a deprivation of privilege than confinement, is—*co*[illegible] [illegible] *limits of the post.*

per se, a restraint of the person, and in the majority of two penalties—confinement and hard labor—are now combined in the same sentence; the usual form being confined at hard labor,' (in prison or guard-house,) for a pecified term. Confinement in a military prison espe- now rarely awarded without the addition of hard labor. or, being a separate penalty, must be expressed in terms entence, or it cannot be administered,[4] except—as will be noticed—where necessarily involved in the peculiar f punishment adjudged, as in the case of confinement itentiary or at the Leavenworth prison.

nement in a penitentiary. This form of imprison- nich had previously been recognized by the legal author- punishment sanctioned by usage for military offenders,[5] ifically authorized and provided for in a section of an Act ess of July 16, 1862, now incorporated in the 97th Arti-

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me instances during the late war persons were sentenced by tial to be confined in a "fort" or "fortress." See Vallandi- ase, in G. O. 68, Dept. of the Ohio, 1863.

DIGEST, 284.

ences simply of "hard labor," or of "hard labor on the public r of certain particular labor or labor on particular works—as ns, bridges, roads, &c., or in breaking stone—unconnected in ce with confinement, were not unfrequently imposed during ar. See G. O. 11, Dept. of the Mo., 1862; Do. 72, Id., 1866; , Id., 1867; Do. 101, 102, Dept. of the East, 1864; G. C. M. O. of the Potomac, 1864.

ceptional sentences of this class are found in the early Orders— ct. 31, 1820, and Do. 56 of 1824—as follows: To serve at hard certain term "with an iron collar around his neck weighing ds;" and to similarly serve, "chained to a wheelbarrow."

ST, 286; Simmons § 684; Clode, M. L., 171. The two punish- referred to as distinct in our 83d Article, in par. 896, Army d in the British Army Act § 44.

es *v.* Hoover, 20 Howard, 65; IX Opins. At. Gen., 80; X Id.,

cle of war[1]—as follows:—"*No person in the military service shall, under the sentence of a court-martial, be punished by confinement in a penitentiary, unless the offence of which he may be convicted would, by some statute of the United States, or by some statute of the State, Territory, or District in which such offence may be committed, or by the common law, as the same exists in such State, Territory, or District, subject such convict to such punishment.*"

The effect of this statute is to prohibit the infliction of penitentiary confinement except in cases of certain *civil* offences cognizable by court-martial. That is to say, while such confinement cannot legally be adjudged or executed upon military persons convicted of purely military offences such as desertion, mutiny, cowardice, disobedience of orders, &c., it may legally be adjudged or executed upon those convicted of any civil crime cognizable under Art. 62 as being prejudicial to good order and military discipline, or of the stealing, embezzlement, or kindred offence made punishable by Art. 60, or—in time of war—of any of the offences specified in Art. 58,—provided, of course, the particular offence is one which, by U. S. statute or the local law, may be visited with such confinement.[2]

By the term "*penitentiary*," as used in the Article, is understood any public civil prison—as the U. S. penitentiary in the District of Columbia, or the prisons "erected by the United States"[3] in the several Territories, or those established by the laws of the different States[4]—in which prisoners are subjected to a course of discipline and labor. A sentence of confinement in a penitentiary is one in which the penalty of "hard labor" is

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1. Appropriation is annually made by Congress, generally in the "sundry civil" appropriation Act, for the cost of the "care, clothing, maintenance, and medical attendance," of military convicts confined in State penitentiaries, under this Article of war.

2. DIGEST, 80–81; G. O. 4 of 1867; Do. 21, Dept. of the Platte, 1866; Do. 21, Id., 1871; Do. 44, Eighth Army Corps, 1862; G. C. M. O. 34, 35, 43, 46, 72, 73, Dept. of the Mo., 1870. And see *Ex parte* Mason, 105 U. S. 700, in which the subject has recently been fully passed upon.

3. See Sec. 1892, Rev. Sts.

4. DIGEST, 81. And see par. 910, Army Regs. The penitentiary at Albany, New York, has been resorted to more frequently than any other State institution. In the recent case of Sgt. Mason, (G. C. M. O. 26, Dept. of the East, 1882,) the order as to the execution of the confinement in a penitentiary adjudged by the court, is—"Subject to the approval of the Secretary of War, the penitentiary at Albany, N. Y., is designated as the place of execution."

cessarily involved,[1] and in which therefore it need not be added in terms.

The usual form in which this punishment is adjudged in a sentence of a court-martial is—'To be confined (for a certain term specified) in such penitentiary as the reviewing (or proper) authority may designate.'[2] A sentence of confinement expressed in general terms, as—"in such *place*," &c., might indeed legally be *executed* in a penitentiary if the offence found were such as to authorize it:[3] the preferable form, however, is as first given. Dismissal in the case of an officer, and dishonorable discharge in that of a soldier, should be *added* in a sentence imposing this form of confinement.[4]

Term of imprisonment in general. The term of imprisonment imposable by a general court-martial is, (except in the two minor species of confinement appropriate to enlisted men only,) limited neither by law nor usage; no scale of imprisonments for different offences or offenders, or even maximum or minimum punishments, (except inferentially under Art. 58,) having been enacted by statute or established by custom. Imprisonments for ten, fifteen, eighteen, and twenty years,[5] and even for life,[6] were in some instances imposed during the late war for specially aggravated crimes. To be imprisoned "during the war" was at

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1. Millar *v.* State, 2 Kans. 174.

2. A usual form in the Navy, where the fleet, &c., is at sea or in a foreign port, is—'To be confined on board such vessel, (of the ——— squadron,) as the Commander-in-chief of the Station may direct, until such time as he may be sent to the United States in a public vessel; and then in a penitentiary to be designated by the Secretary of the Navy."

3. DIGEST, 81.

4. See G. O. 36, 58, 72, Army of the Potomac, 1862; Do. 50, Id., 1864.

5. See instances in G. O. 397 of 1863; Do. 1 of 1864; G. C. M. O. 210, 506, 577, 582, 625, of 1865; Do. 95, 153, 154, 186, of 1866; G. O. 90, Dept. of the Gulf, 1863; Do. 14, 27, Mil. Div. West Miss., 1865; also Gen. Black's case, Hough, (P.) 161.

6. See instances in G. O. 335 of 1863; G. C. M. O. 391 of 1865; G. O. 3, Defences of Washington, 1863; Do. 70, Dept. of the Mo., 1865; Do. 19, Dept. of the Gulf, 1865; Do. 52, Dept. of the Pacific, 1865; Do. 30, Dept. of So. Ca., 1866; Do. 37, Dept. of Va. & No. Ca., 1863; G. C. M. O. 39, 92, 93, Id., 1865; Do. 25, Dept. of Ky., 1865; Do. 31, Fourth Mil. Dist., 1867; Do. 23, Id., 1868; Do. 59, Id., 1869; Do. 153, 175, Fifth Id., 1869; Do. 53, Id., 1870. Imprisonment for life was still more frequently imposed by Military Commissions.

that period also a not unfrequent form.[1] Sentences of confinement 'during the remainder of the term of enlistment' of the soldier were then also more common than now.[2] At present—in time of peace—the term of imprisonment for *desertion* is from two to five years; two years being the more usual measure where the act was not aggravated: five years is also rarely exceeded for any *other* offences, except aggravated instances of violent crime taken cognizance of under Art. 62.[3]

As to the term of confinement in a *penitentiary*, this is not limited or affected by Art. 97 above set forth, and, where the sentence is discretionary—as under Art. 60 or Art. 62—may be imposed without regard to the provision of the civil statute fixing the term of punishment for the act as a civil crime. While such provision may well be taken into consideration in estimating the proper measure of punishment for the offence found, the court may, in its discretion, considerably exceed the limit of the statute.[4]

Imprisonment after discharge or expiration of term of enlistment. It is now settled by the long-continued usage of the service and practice of the War Department that a soldier (or an officer) may be sentenced to be discharged (or dismissed) and thereupon imprisoned for a certain term; in other words, may be required to submit to an imprisonment at the hands of the military authorities after, by the effect of the dishonorable discharge, (or dismissal,) he has been separated from the military service and has become a civilian. The legality of such imprisonment consists in the fact that, after the discharge, the party is held confined not as a military person but as a *civilian convict*—as an offender against the laws of the United States under the

1. See case of sentence of imprisonment "for during the war in Missouri," in G. O. 10, Dept. of the Mo., 1863.

2. In such sentences courts should indicate the date on which the enlistment of the accused expires, so that the reviewing officer may be at once advised of the exact *term* of imprisonment adjudged and facilitated as to his action. See DIGEST, 284.

3. As in case of Sergt. Mason, (G. C. M. O. 26, Dept. of the East, 1882.)

4. DIGEST, 81; *Ex parte* Mason, 105 U. S. 696, where the term adjudged, of *eight years*, is recognized as legal.

ntence of a tribunal authorized by public statute to punish at scretion the offence committed.[1]

Upon similar grounds it is equally settled that a court-martial ıy legally sentence a soldier to a term of imprisonment which ıst necessarily extend beyond the period of his existing term of listment, and that the soldier may legally be held confined der the sentence beyond such term in full execution of the nishment.[2]

Execution of the punishment of imprisonment. Conement *at a military prison*, which was executed at a great :iety of fortified posts during the late war,[3] is now executed the Military Prison established, by statute,[4] for the confine:nt and reformation of military prisoners, at Fort Leavenworth, ınsas;[5] except in cases of persons sentenced to such confine:nt by courts-martial within the Division of the Pacific, when : punishment is executed at the prison on Alcatraz Island in : harbor of San Francisco.

Upon a strict construction of Sec. 1344, Rev. Sts., it might :ll be held that only such persons could legally be committed confinement at the Military Prison at Fort Leavenworth as d been specifically "sentenced to imprisonment therein." *In 'actice*, however, an express mention of this prison in the senıce has not been regarded as requisite, but—wherever the senıce is worded in general terms—the mere designation of such ison as the place of confinement, by the competent reviewing

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1. DIGEST, 285; *Ex parte* Mason, *ante*. And see *post*, p. 601.

2. See O'Brien, 276; G. C. M. O. 61, Dept. of Dakota, 1884.

3. Among the principal were Forts Preble, Adams, Warren, Wood, huyler, Lafayette, Mifflin, Delaware, Whipple, Norfolk, Macon, Puki, Marion, Jefferson, Pickens, Pike, the Rip Raps, Dry Tortugas, ınson's Island, Camp Chase, Camp Hamilton, Ship Island, and the sts of Wheeling and Nashville.

4. By the Act of March 3, 1873, c. 249, incorporated in Ch. Six, Tit. V of the Revised Statutes, as amended by the Act of May 21, 1874, ınging the original site of the prison.

5. As to the collecting of prisoners at established depots in the differmilitary Departments, before sending them to the Military Prison, l the papers, orders, reports, &c., required to be forwarded with each soner—see Army Regs., pars. 937–940; also DIGEST, 284. As to *nging the place of confinement* of prisoners confined at this prison, par. 911, Army Regs.

officer, has been considered as sufficient to authorize a confinement therein in execution of the sentence.[1]

Confinement *at hard labor* is executed—at places other than the Military Prison at Fort Leavenworth—by employing the prisoners in road-making, bridging, erecting or repairing of fortifications or quarters, gardening, wood cutting, policing, &c. At Leavenworth this punishment is executed by means of the "labor and trades" prescribed for the prisoners by Sec. 1351, Rev. Sts., and the manufacturing of supplies for the army authorized to be done by them by the Act of March 3, 1879, c. 182. But, as heretofore remarked, persons sentenced or committed to the Leavenworth prison, are subject to be put at the labor and employment indicated in the statute, whether "hard labor" be or not expressly imposed by the sentence.[2]

A sentence to hard labor is not legally executed by putting the prisoner at *light* work, or work less severe or continuous than that required of other prisoners held at the same prison and similarly sentenced.[3]

The provision of the Act of June 25, 1868, known as the "eight hour law," does not apply to prisoners employed at hard labor under sentence of court-martial.[4]

Confinement *in a penitentiary* is executed by the forwarding of the prisoner under guard to the penitentiary designated by the proper authority,[5] and his delivery, with copies of the necessary orders, &c., to the warden or other official in charge. Upon his commitment, the military prisoner becomes subject to the same government and discipline and to the performance of the same labor as are the civilian prisoners.[6]

The *point of time* at and from which a sentence of Imprisonment *begins to be executed*, in the absence of any statutory provision on the subject, is now fixed, in practice, by an order of the Secretary of War, issued originally in 1870, which directs that the confinement "shall be considered as beginning from the date

1. See Army Regs., par. 936; also G. C. M. O., of Hdqrs. of Army, *passim*. The papers required to be sent with prisoners to this prison are specified in par. 939, Army Regs., as amended by G. O. 57 of 1884.
2. DIGEST, 287.
3. DIGEST, 287.
4. See G. O. 71, Dept. of the South, 1869
5. As indicated in Army Regs., par. 910.
6. DIGEST, 81.

ıe promulgation of the sentence in Orders."[1] Thus begin-
, the execution continues to the end of the term of years,
ths, &c.,[2] adjudged by the court, or till the happening of
e event—as the payment of a *fine*—upon which its duration
be expressly made by the sentence to depend, or till a par-
, or remission of the unexpired portion of the punishment,
ıted by the competent authority; subject also to the possible
idgment of the period by a *credit* gained by good conduct, a
:ter presently to be noticed.

ıs heretofore remarked, the fact that the soldier, being sen-
ced with the confinement to dishonorable discharge, has been
:harged accordingly, or that the term for which he enlisted
expired pending the confinement, affects in no manner the due
rse of the execution of the punishment. The military juris-
tion having once duly attached in his case while he was a
lier, and he having been as such duly tried and convicted, and
sentence of confinement having been duly approved, it is im-
terial to its execution whether he actually remain or not in
military service, his status being now simply that of a public
oner held by the authority of the United States as an offender
inst its laws.

ommencing as indicated, the *term of the execution* continues
un without regard to any intermediate periods during which
prisoner, though in military custody, may not be undergoing
specific confinement adjudged,[3]—as a period during which he
etained at a depot or elsewhere before being forwarded to the
:e of confinement, or during which he is being transferred to

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G. O. 21 of 1870, incorporated in par. 901, Army Regs., and
nded by G. O. 103 of 1884. It is added in the amended Order—
less the time of its commencement is otherwise expressly fixed by
sentence of the court or in the order promulgating the proceedings."
h forms of fixing the time are rare in practice.

may be noted that the Order applies only to persons sentenced who
"in custody at the time" of the promulgation of the sentence, thus
uding such persons as may have *escaped* or been *taken prisoner by*
emy before that date. As to such, the execution of the punish-
t would properly commence from the date of their subsequent com-
ment, (if captured or returned,) to the prison or penitentiary ap-
ted for their confinement.

"In calculating the period of imprisonment, the day on which the
ence commences, and that on which the prisoner is to be released,
both to be counted." Simmons § 779.

See Simmons § 782.

such place, or from such place to another when the place finement is changed by competent authority,[1] or during he may be held in hospital or his quarters under medica ment.[2] Otherwise, however, as to a period of *unauthori* sence from military custody, occasioned by an *escape;* the on recapture, being legally remanded to serve out the period sentence which remained to be served at the date of the e

That the period of an arrest in confinement before tr before final action upon the sentence, however unreasonabl tracted, cannot legally be *credited* upon the term of impriso imposed by the sentence, in executing the same, and th reviewing authority, if he thinks it just and proper tha period should be deducted from the term adjudged by the can do so only by a proportionate mitigation of the senten approving the same, or subsequently by a partial remissio also well established.[4]

Time credits. The term of imprisonment may, how legally be abridged in its execution, where the prisoner, by *conduct* pending his confinement, becomes entitled to such al ment under the law. By the Act of Congress of March 3, 18 '*all prisoners convicted of any offence against the laws United States, and confined in execution of sentence in any or penitentiary of any State or Territory, (which has no syst commutation for its own prisoners,) shall have a deduction, their several terms of sentence, of five days in each and ever endar month during which no charge of misconduct shall have sustained against them, and shall be discharged at the expir of their several terms of sentence less the time so deducted.* view of this Act, (as also of the provision of Sec. 1352, Rev.

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1. "The authority which has designated the place of confineme higher authority, can change the place of confinement." G. O. 1868. And see De Hart, 249; Army Regs., par. 911. The tr may legally be made where called for by the exigencies of the se and where the punishment as adjudged is not *added to* by the ch DIGEST, 287. An *unauthorized* transfer of a prisoner is in the n of a *trespass* upon him, (Clode, M. L., 171,) and entitles him to b charged upon *habeas corpus*, as from an illegal imprisonment. Allen, 7 Jurist, 234.

2. Simmons § 783; Griffiths, 152, 176; Harcourt, 168; De Hart

3. Simmons § 784; Griffiths, 172; DIGEST, 297–8.

4. DIGEST, 286; G. O. 105 of 1874.

orizing in general terms a similar indulgence for the con- ; at the Military Prison at Leavenworth,) a General Order; 64,) was, on June 21, 1875, issued from the War Department, which the rule prescribed in the Act was applied to *military* oners, as follows:—"To equalize the practice in regard to ishment of military prisoners, so far as practicable, an abate- it of five days for each month of consecutive good conduct r be allowed upon each sentence to confinement for over six ıths." And it is directed that the commanders of the Depart- its in which the places of confinement are situated shall issue special orders for the release of the prisoners who shall ome entitled to the allowance. Since the policy of the Gov- ment in regard to its convicts has thus been extended to mil- y cases, a large majority of the prisoners confined both at Fort venworth and Alcatraz Island have always been induced so conduct themselves as to earn and receive considerable abate- ıts of their terms of imprisonment.

Execution of cumulative sentences of imprisonment. has already been indicated in this Chapter, a sentence of im- sonment duly adjudged a military person who is at the time lergoing a sentence of the same character, or who has received h a sentence which however has not yet been approved or ımenced to be enforced, is *cumulative* upon the earlier sentence l to be executed accordingly; *i. e.* its execution is to follow nediately upon the completion of the execution of the former ıishment, and to proceed in due course till itself completed.

Forfeiture of Pay, &c.—***Authority for this punishment.*** is, though in terms authorized as a punishment by the Articles war in one instance only—*viz.* by Art. 101 in connection with pension from command[1]—is in fact authorized, by the *usage the service*, wherever the sentence is discretionary with the rt, and, in cases of soldiers, is the most frequent of all the itary punishments.

Distinguished from fine, &c. Forfeiture is to be dis- guished from *fine*, a punishment which imposes a pecuniary

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[1] As to the nature of this forfeiture, see "Suspension," *ante*.

liability in general, not necessarily affecting pay;[1] and als *stoppage*, which is not properly a punishment at all but a on account, sometimes indeed resulting from punishmer mode adopted for executing the same.[2]

Different forms of forfeiture. Forfeiture by senteno be expressed in different forms according to the particula or amount of pay intended to be affected. Thus the forfe may be general and entire, *viz.* of "*all pay due*," or—a which is usual where the officer or soldier is detached from service by a dismissal or dishonorable discharge adjudged b same sentence, and the object is to cover all possible clain pay up to the date of the actual execution of the sentenc "*all pay due or to become due.*" Where it is not intended b court to deprive the accused of his entire pay, the sentence impose a forfeiture of his pay for a month or months, or portion—as one half, or so many dollars—of such pay,[3] or si of so many dollars in general terms, or of the pay or a porti the pay "for the same period" as that of the term of an prisonment (or suspension) adjudged in the same sentence sentence, in forfeiting certain pay, may *except* from the forfe an amount stated, to be rendered to the soldier for his u benefit.[4]

The forfeiture of "allowances." The forfeiture ma clude "allowances" with pay, though a forfeiture of "p alone will not embrace allowances.[5] A forfeiture of "pay allowances" affects, with his pay, any money-commutatio other pecuniary emoluments incidental to the office, ran duty of the party and due him at the date on which the sent takes effect—as the allowance for quarters in the case of an of

1. See under "Fine," *ante*.

2. DIGEST, 267, 465.

3. As to the form of forfeiture of a portion of the monthly pay soldier, see DIGEST, 272; Army Regs., par. 906.

4. See par. 927, Army Regs.; also the G. O., Dept. of the South, referred to in Chapter XXI—"Mitigation." In sentences of forfe imposed in connection with confinement by *naval* courts-martial, the often *excepts* from the forfeiture a certain designated sum, to be pai accused for "necessary prison expenses during the term of his co ment," or in terms to a like effect. See recent instances in G. C. M 1, 3, 4, 6 to 10, 14 to 17, 22 to 27, &c., Navy Dept., 1885.

5. McNaghten, 27; DIGEST, 271, 470.

: allowance for clothing in the case of a soldier.[1] A for-
of allowances other than pecuniary—as of rations or cloth-
such, would not now be sanctioned by the usage of the
.[2]

forfeiture to be to the United States only. We have
ore noticed the principle that a court-martial can neither
pay for the benefit of an individual, nor by its sentence
is to its disposition.[3] All forfeitures of pay accrue to the
States, and the disposition of the same as public funds is
:r belonging to the province of Congress.[4]

ust be express, and clearly defined. A further prin-
overning this subject is that pay can be forfeited only in
terms—that a forfeiture cannot be involved in any other
. A simple sentence of death,[5] dismissal, dishonorable dis-
or imprisonment, cannot affect the right of the party to
ay as may be due him at the date of the approval or ex-
of such sentence. Where, therefore, the court intends to
pay, it must express its intention in terms: pay cannot be
d by implication.[6]
the terms of the sentence declaring the forfeiture should
ear and precise that the specific pay and amount of pay
d to be divested may fully appear; and that the nature
ent of the forfeiture should be evident from the sentence
ithout any reference to other source of information being

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to the effect of the term "allowances" in a sentence, (which it
d included bounty-money,) see Lander *v.* U. S., 92 U. S. 77.
llowances" means allowances due the party *as a soldier* at the
the taking effect of the sentence, see DIGEST, 371.
ture, by sentence, of *pension*, as an "allowance" or otherwise,
wn to our military law.
itences forfeiting all clothing, &c., "except fatigue clothing;" and
s expressly excepting from a forfeiture of pay and allowances
cessary clothing and subsistence," or in terms to such effect, are
the early G. O., but have been long disused in practice.
GEST, 271–2, 275.
to the appropriation of forfeitures, ("stoppages or fines,") ad-
by court-martial, to the support of the Soldiers' Home, see Sec.
ev. Sts.; DIGEST, 272, note.
jor Herod's Case, XIII Opins. At. Gen., 103; DIGEST, 271, note.
GEST, 270, 469.

required—are points which have already been illustrated un previous general head.[1]

Forfeiture as a punishment in general. While for ure is the most effective of the minor punishments when j ciously imposed, it may yet be so employed as to be subjec serious objection. Thus, depriving an officer or soldier of *entire* pay, while retaining him in the army, (*i. e.* not dismiss or discharging him in the sentence,)—leaving him nothing the support of his family, or for the purchase of articles nec sary to health, cleanliness, &c.,—has been commented upon in general contrary to public policy and detrimental to the int ests of the service.[2]

Execution of this punishment. Where the operation the forfeiture is specifically limited by the sentence itself to particular period, as where it is imposed for the same period as term of imprisonment or suspension adjudged in the same sen tence, there is no difficulty in defining the execution of the fo feiture, the same being concurrent with the term of the princip punishment as determined by the general rules heretofore co sidered.

Where the operation of the penalty is not thus fixed by th sentence, the date or mode of its execution will depend upon th nature and extent of the forfeiture. Where the sentence in ge eral terms forfeits all pay *due*, the forfeiture, as a general rul attaches *upon the approval of the sentence* by the proper authority and to such pay as may then be due and payable to the accuse The approval, *ex vi*, by operation of law, divests his right such pay and the same thereupon accrues to the United State Where, however, pay due is forfeited in connection with dismi or dishonorable discharge imposed by the same sentence, the fo feiture is in general to be considered as intended to take eff

1. See *ante*—"Principles governing the framing of the Sentence;" DIGEST, 271; G. C. M. O. 65, Dept. of Dakota, 1880. As to the defi of the forfeiture when imposed in connection with *reduction*, see DIGE 470. As to the effect of a forfeiture, inexactly expressed, of "ten dol of his pay for six months," see ruling in Circ. 5, Hdqrs. of Army, 1883—in which however the author does not concur.

2. See G. C. M. O. 2, 5, Dept. of Texas, 1876; G. O. 41, Dept. of Mo., 1882; Clode, (2 M. F.,) 108.

3. DIGEST, 274.

:ously with the execution of the dismissal by which the
;ervice of the party, and with it—regularly—his right to
minated.[1]

the sentence forfeits pay both due and 'to become due,'
.ture attaches both to pay due at the date of approval
ccruing monthly thereafter so long as the party remains
vice.[2]

the forfeiture is not of the entire pay of the party but of
only—as the pay of one month or several months, or a
r specified number of dollars of the pay of such a period,
a certain number of dollars of his pay in general—such
may *legally* be, and, it would seem, should be, satisfied
y amount—whenever accrued—which may be due and
o the soldier at the regular bi-monthly or other payment
: the approval of the sentence, or out of such amount so
ill go, where it is less than the amount of the forfeiture,
he remainder to be satisfied at the succeeding payment
nts.[3] In practice, however, it seems to have been pre-
exclude from the application of the forfeiture pay due
ble at the date of the approval, and to apply it only to
.ed subsequently to that date.[4]

pending the execution of a forfeiture of a certain amount
a certain number of months' pay, the term of enlistment
lier comes to an end, he cannot be retained in the service
rpose of satisfying the forfeiture and until it is satisfied,[5]
titled to be discharged equally as if no forfeiture had
dged in his case. Nor, if he thereupon or subsequently
can the unsettled forfeiture be revived as a charge
is pay. For, a pecuniary liability incurred under a cer-
tment can legally constitute an offset only against the
ayable for services under that contract, and can no more
d against the pecuniary consideration of a new and dis-
ract than it can against the pay of another soldier.[6]

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his point well illustrated in DIGEST, 274 § 13.

e case, however, of a *deserter*, such a sentence would affect
ccruing subsequently to his apprehension or surrender, that
fore being already divested by operation of law, under par.
Regs., (as amended by G. O. 68 of 1883.)

)IGEST, 272–3.

' Regs., par. 907.

ST, 273 § 10.

ST, 273 § 11.

A forfeiture adjudged after, or pending the execution of, a arate forfeiture, and expressed in general terms, or not specifi restricted to a distinct period, becomes *cumulative* upon the ea one, and is to be executed as an additional liability.[1]

Official noting of forfeiture and action of paymas In all cases where soldiers remaining in the service are subje to sentences of forfeiture, the amount and particulars of the feiture, with the date, number and source of the General Or approving and promulgating the sentence, should be noted the company or other proper commander opposite the name the soldier upon the Muster-and-Pay Roll made out for the co mand next after the publication of the sentence at the post station. The forfeiture will then be enforced by the paymas who pays the command and who will either deduct the amou of the forfeiture from the amount of pay accruing to the soldi or will omit to pay him altogether, according to the extent of t forfeiture and the nature of the sentence. The forfeiture, if n cancelled at the first payment, must be continued to be noted successive rolls till fully discharged.[2]

Effect of a remission upon execution of pending fo feiture. A remission in whole or in part of a pending forfei ure should properly, in the opinion of the author, take effe upon any pay accrued at its date and not *actually* forfeited. Th if a soldier is sentenced in January to forfeit two months' pa and in February the forfeiture is remitted, he would be entitle at the bi-monthly payment at the end of February, when his pa account for the two months is regularly settled, to receive h full pay for the two months, the forfeiture being entirely remove by the remission. The practice, however, is apparently not i accordance with this view, but governed by par. 926 of the Arm Regulations, which declares that—"An order remitting forfeitu of pay operates only as to time subsequent to its date;" that is t say—affects only pay accruing subsequently to its date.[3]

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1 See Army Regs., par. 908.

2 See Army Regs., par. 928, (amended by G. O. 89 of 1883.)

3 A regulation which seems to proceed upon a miscomprehension the nature and plenary effect of pardon. See, however—to the sa effect—Circ. 4 of 1883.

UNISHMENTS LEGAL AND APPROPRIATE FOR ENLISTED MEN ONLY.

:se are Reduction, Dishonorable Discharge, Solitary Con-
ent, Confinement on bread and water diet, Ball and Chain.

luction.—*Nature of and authority for the punish-*
. This punishment, commonly termed reduction to the
,[1] consists, in our service, in the degrading of a non-com-
ned officer—sergeant or corporal of a company[2]—to the
ınd status of a private.[3] Reducing to an intermediate grade,
n sergeant to corporal, is not known to our law.[4] The pun-
nt as adjudged is absolute, *i. e.* without limitation as to
It is specifically mentioned in a single Article of war, the
where it is *required* to be imposed upon conviction of the
e of conniving at the hiring of his duty by a soldier. By
ıthority, however, of the usage of the service, recognized
l in pars. 172 and 896 of the Army Regulations, it may be
ed by any court-martial wherever the sentence is discre-
y.
luction by sentence as a *punishment* is to be distinguished
the reduction authorized by the Army Regulations, (par.
viz. that which may be ordered by the commander of a
ent on the application of a company commander.

ɔperly adjudged with confinement. As has already
remarked,[6]—when a term of imprisonment is adjudged a

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t was formerly sometimes designated as reduction to the "rank"
ation" of a "private sentinel." See Tytler, 318; Macomb, 62;
ıses in the early General Orders.

t is declared in par. 913, Army Regs., that—"Ordnance sergeants,
issary sergeants and Hospital stewards, though liable to dis-
, may not be reduced."

hief Musician, though an enlisted man, is not a non-commissioned
and so is not subject to this punishment. DIGEST, 156.

. non-commissioned officer of the Engineer Battalion may be re-
to a private of either the *first* or *second class*, established by Sec.
Rev. Sts. See a case of such reduction to a private of the "second"
ı G. C. M. O. 70 of 1868.

therwise in the British code. Army Act § 44, 183.

ı G. O. 76 of 1824, is a case of a corporal sentenced "to perform
ies of private sentinel *for one month.*" Such a sentence would
warranted by present usage.

:e *ante*, "Imprisonment," p. 594, and authorities cited in note 2.

non-commissioned officer, the sentence should also embra duction. This for the reason assigned by the authoritie to retain the sergeant or corporal under the circumstances rank must tend to degrade the same and detract from the r due to it, and that therefore, when thus punished, he sho punished as a private soldier. In such a case also the se should properly be so worded as to require or allow the tion to take effect before the imprisonment is entered upo

Reduction with ignominy. In some few cases red has been made ignominious, *i. e.* has been directed in th tence to be accompanied by the cutting off, in the presence command, of the chevrons and stripes of the non-commis officer.[2]

Execution of the punishment. This is a punis which, like dismissal in the case of an officer, executes taking effect, as it does, at once upon the approval of the se and notice to the accused. Upon the promulgation and ann ment to him of the approval by the competent authority, he forthwith to be a non-commissioned officer and becomes a pr no further act being requisite to make the punishment ope in law: his pay also is from the same date corresponding duced. He cannot however legally be required to surrend *warrant* as sergeant or corporal,[3] unless it is expressly de therein, or is accepted by him upon the express condition it shall be surrendered upon reduction.

A non-commissioned officer duly reduced by sentence re reduced, (and borne on the muster-rolls as a private,) till th of his enlistment, or till the punishment, (which is a 'contin one,) is remitted by the competent pardoning authority. even a remission will not restore him to his former rank i vacancy caused by his reduction has been filled. In such a he cannot, after remission, be restored till a vacancy occur he is reappointed by his regimental commander.

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1. See Hughes, 95; Hough, (P.) 734.

2. See instances in G. O. 11 of 1849; G. C. M. O. 70 of 1868; 46, 67, Army of the Potomac, 1861.

3. DIGEST, 423.

Reduction of officers. By two statutes enacted and in force ing the late war, reduction to the ranks was authorized as a iishment for *commissioned officers.* These were the Act of rch 3, 1863, c. 75, s. 22, empowering courts-martial—"*to sence officers, who shall absent themselves from their commands hout leave, to be reduced to the ranks to serve three years or ing the war;*" and the Act of the same date, c. 120, s. 6, uiring the imposition of this punishment upon officers conted of failing to turn over to the proper official captured or ndoned property coming into their possession. No case is wn of a conviction under the latter statute, and but few trials e had under the former.[1] No Act passed since the war has horized such punishment. Reduction of officers *in grade*—rom captain to lieutenant—is also unknown to our law.[2]

Dishonorable Discharge.—***Nature of and authority for punishment.*** This punishment corresponds to dismissal in case of an officer, in that it expels the offender with disgrace m the army and remands him to the status of a civilian: it ails however no legal disability either military or civil.[3] It is be distinguished from the discharge given by executive *order*, authorized by Art. 4, the latter being, not a *punishment*, but a re rescinding or discontinuance of a contract.[4]

Dishonorable discharge, though not expressly required or aurized to be adjudged for any particular offence by the Articles war, is indicated in general terms by Art. 4, as a penalty which irts-martial may award, and is recognized in the Army Reguions, (par. 896,) as a legal punishment for enlisted men: it may

. Instances of officers convicted under this statute and sentenced to uction are published in G. O. 27 of 1864; Do. 80, Dept. of the Gulf, 3; Do. 38, Dept. of the East, 1864; Do. 36, Middle Dept., 1864; Do. d Div., 5th Army Corps, 1864; G. C. M. O. 25, 51, Army of the omac, 1864; Do. 12, Id., 1865.

. See G. C. M. O. 19 of 1885, where a reduction of an officer from eral to major is disapproved by the President as being without legal hority.

. Dishonorably discharged soldiers, who have also been confined er their sentences at Fort Leavenworth or Alcatraz Island, are not equently re-enlisted where their record for conduct in confinement been good.

thus be imposed wherever the sentence rests in the discretion of the court.

When properly resorted to. This punishment is usually and properly adjudged by courts-martial in connection with terms of imprisonment in a military prison or penitentiary;[1] it being in general regarded as for the interests of the service that a military convict, before being subjected to a protracted confinement, should be formally separated from the army.[2] The view has also been repeatedly declared in General Orders that dishonorable discharge *alone* is not an adequate or proper penalty for desertion or other grave military offence, since merely to require soldiers, upon conviction of such offences, to leave the army is in effect to offer a premium for their commission.[3] On the other hand it has been viewed as an inappropriate, and too severe, punishment for a single act—especially where a first offence—of breach of discipline.[4] The result is that dishonorable discharge, except in combination with confinement, has become a comparatively rare form of sentence in our service; and, where resorted to, it is usually also accompanied with forfeiture of pay.

Form of the punishment. The ordinary and proper form of this punishment in a sentence is—"to be dishonorably discharged;" the words "the service," or "from the service" or "military service," or "the service of the United States," being often added. The form—"to be discharged the service," without using the word "dishonorably," though unusual, is sufficient in law, and has the same effect as if such word were not omitted; the discharge adjudged by a sentence being a *punishment* and

1. DIGEST, 234.

2. See G. O. 36, 58, 73, Army of the Potomac, 1862; G. C. M. O. 50, Id., 1864; Do. 71, Dept. of Texas, 1873. The discharge not only relieves the army of a member found unworthy, but—the number of enlisted men being fixed by statute—enables the authorities to enlist a new man in his place.

3. Such a sentence is particularly objectionable where the soldier has yet a long time to serve under his enlistment. G. C. M. O. 23, Dept. of the Mo., 1870.

4. G. O. 9, Dept. of the South, 1873; Do. 61, Id., 1874; G. C. M. O. 42, Dept. of Texas, 1874; Do. 18, Div. of Pacific & Dept. of Cal., 1875. Otherwise where the offence is a grave one, exhibiting the soldier morally unfit to remain in the service—such as larceny. G. O. 48, Dept. of Dakota, 1869.

herefore necessarily dishonorable.[1] A sentence—"to be *dis-*
ıissed the service," while a rare and irregular form, inappropriate
ı a case of a soldier, has, where employed,[2] the same effect as if
e word *discharged* had been used.[3] Where dishonorable dis-
arge and imprisonment are imposed together, the sentence will
eferably be so expressed as to indicate that the soldier is to be
st discharged and *then* imprisoned.[4]

It may be added that the court, when proposing to award this
nishment, should adjudge it in specific terms. No other pun-
ıment, (except death,) nor any conviction of an offence, however
ıve, can operate *per se* to discharge a soldier from the army.[5]

Discharge with ignominy. A mode of dishonorable dis-
arge, sanctioned by usage for time of war,[6] is *drumming*, (or
gling,) *out of the service*,[7] with the "Rogue's March," in the
esence of the command. This ignominious form is sometimes
njoined with circumstances of *special* ignominy. Thus soldiers
ve been sentenced to be drummed out after having their clothing
ripped of all military insignia, or after being tarred and feath-
ed, or with their heads shaved or half-shaved, or with straw

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1. DIGEST, 3, 231, 232. It is not within the power of a court-martial
ı award an *honorable* discharge. DIGEST, 232; G. O. 16, Div. of the
tlantic, 1874.

2. See instances in G. O., May 17, 1821; Do. 298 of 1863; G. C. M.
. 227, 616, of 1865; Do. 58, 66, of 1866.

3. G. O. 45, Dept. of the Cumberland, 1867.

4. DIGEST, 234, 235. A sentence adjudging a dishonorable discharge
to take effect at such period *in a term of confinement* as shall be desig-
ated by the reviewing officer," was disapproved as exceptional and ir-
egular, by the Secretary of War, (concurring with the Judge Advocate
eneral—see DIGEST, 235,) in G. O. 90 of 1872, (now incorporated in
ar. 904, A. R.) And to a similar effect see G. O. 30, Dept. of Cal., 1872.

5. It has been held in a civil court that a conviction of *bigamy* could
ot so operate. Regina *v.* Creamer, 10 Lower Canada R., 404.

6. This punishment—as also shaving of the head—has been referred
ı in some Orders, (see G. O. 44, Dept. of the Mo., 1867; Do. 51, Id.,
880,) as not authorized because not contained in the list of "legal"
unishments set forth in G. O. 4 of 1867, (now par. 896, A. R.) In-
ances of these punishments, however, occur as lately as in G. C. M.
. 23, 40, of 1867; Do. 6, 36, 55, of 1868; G. O. 52, Dept. of the South,
870; Do. 30, Id., 1871. As to the non-application of par. 896 to time
war, see text *ante*, p. 563-4.

7. The sentence has sometimes been phrased, in general terms—"to
ignominiously discharged." As in G. C. M. O. 596, 616, of 1865.

halters around their necks, or bearing placards inscribed with the names of their offences.[1]

Execution of the punishment. This punishment is executed by the delivery to the soldier[2] of a certificate or "discharge in writing," which, as required by the 4th Article of war, must be "*signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present.*" The discharge will be worded in the usual form, as "furnished from the Adjutant General's Office,"[3] but the blank in the body of the certificate, for the insertion of the cause or occasion of discharge, will be filled by a statement to the effect that the same has been given in consequence of the sentence of a general court-martial published in a certain General Order, describing it by the command or authority from which it has proceeded, its number and date.[4] Such statement will show that the discharge was awarded as a *punishment* and is therefore *dishonorable* in law.

The clause generally added in discharges, that 'no objection to the re-enlistment of the soldier is known to exist,' is properly struck out; and the space at the bottom of the certificate headed "Character," (which, however, is no part of the discharge,) is cut off or not filled out.[5]

Where this punishment is imposed in connection with *imprisonment*, the terms of the sentence will in general indicate whether the discharge is intended by the court to take effect before the imprisonment is entered upon or after it is completed. To *postpone* until after a term of imprisonment a dishonorable discharge required by the sentence to be executed first in order, has been

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1. Instances of these forms are to be found in G. O. of Aug. 6, 1813; Do. of Feb. 1, 1814; Do. 32 of 1822; Do. 34 of 1826; Do. 4 of 1828; Do. 29 of 1835; Do. 39 of 1838; Do. 80 of 1842; G. C. M. O. 124, 163, 276, 294, 432, 442, 513, of 1865; Do. 11, 224, 227, of 1866; Do. 23, 40, of 1867; Do. 6, 36, 55, of 1868; G. O. 49, Army of the Potomac, 1862; Do. 49, Dept. of the South, 1862; Do. 11, 20, Northern Dept., 1864; Do. 33, Dept. of the East, 1868.

2. If the soldier is at the time in confinement awaiting sentence, (or under a previous sentence,) a delivery of the discharge to the post commander, or other proper officer, *for him*, to be rendered to him on his release from confinement, is equivalent to a delivery to him personally.

3. Army Regs., par. 238.

4. See Army Regs., par. 240.

5. See Army Regs., par. 240.

Judge Advocate General to be beyond the authority
ring officer.[1] In practice, where the penalty of dis-
ischarge is mentioned in the sentence *before* that of the
t, it is understood as intended to be executed first and
accordingly.[2]

ous discharge by drumming out, &c., is generally
on the party in the presence of the command, under
ate direction of the adjutant, provost marshal, or other
cer, the proceedings and orders in the case being first
id.[3] In a case in the Army of the Potomac,[4] the form
ution was indicated as follows:—"To be drummed
egiment at dress parade, preceded by the drum band
e Rogue's March and a file of soldiers with arms re-
followed by a file of soldiers at 'charge bayonets.'"[5]

Confinement. The usage of the service, as recog-
expressed in par. 896 of the Army Regulations, is the
or this form of imprisonment. In par. 898 it is speci-
e same "*shall not exceed fourteen days at a time, with
tween the periods of such confinement not less than such
d not exceeding eighty-four days in any one year.*"[6]

, 234. This opinion was approved by the Secretary of War
of 1875, and is now incorporated in Army Regs., par. 905.
a sentence provides for the dishonorable discharge of a
e termination of an imprisonment, (now, a very rare case,)
eld by the same authority that it is not within the province
ing officer to order his immediate discharge. DIGEST, 235.
ion followed by Maj. Gen. Hancock in two cases, in G. O.
Dakota, 1872.

r, 234.

Hart, 249.

9 of 1862.

old case—in G. O. Aug. 6, 1813—two privates, on con-
itinous conduct, are sentenced in full as follows: "Each to
close confinement, fasting, and in irons, for 24 hours; after
e, severally, the hair on the left side of the head shaved off
ight side painted, and to be tied together by the neck, and
uard, and drums and fife playing the Rogue's March, from
ent on the Severn, through the streets where the offences
tted, through Church street and on to the suburbs of the
apolis,) "where they shall be discharged."

to say, "no more than six such periods" of fourteen days
year." G. O. 75, Army of the Potomac, 1862.

of 84 days is, of course, the quantum by *one* sentence.
583.

The term, therefore, of this confinement can in no case legally transcend the limit here fixed,[1] nor can it properly transcend for any period the *proportion* indicated.[2] Such term has in some instances indeed been extended, but not lawfully since the adoption of the regulation.[3]

In the early sentences the solitary confinement was sometimes required to be "in the black hole."[4] Later it has in a few cases been directed to be executed in a "light cell,"[5] or in a "dark cell."[6] In one of these cases[7] solitary confinement in a dark prison was disapproved, as being a punishment likely to impair the health of the prisoner.

Confinement "on Bread and Water Diet." This form of confinement which is derived from an early period, being mentioned in Arts. 43, 81 and 129, of the Code of Gustavus Adolphus, is specified in par. 896 of the Army Regulations as among the legal punishments for soldiers. Though formerly frequently employed in our service, it is now comparatively rare. When resorted to in the later cases,[8] it has generally been adjudged if

1. In a case in G. O. 75, Army of the Potomac, 1862, a penalty, in a sentence, of *one year's* solitary confinement was properly disapproved as unauthorized.

2. Thus, where a sentence imposed solitary confinement for two days out of every three in a term of two months—*i. e.* forty days out of sixty—the legal proportion was held to be exceeded. DIGEST, 454.

3. In a case in G. O. 72 of 1832, (before the date of the regulation,) a term of this confinement for *six months* was legally adjudged. In a case in G. O. 234 of 1863, (since the date of the regulation,) a sentence (upon a conviction of a soldier of murder,) which embraced solitary confinement at hard labor for *eighteen years*, was (improperly) approved; but the unexecuted portion was remitted in the later G. C. M. O. 186 of 1866.

4. See G. O. of April 3, 1809; Do. of Aug. 12, 1836.

5. G. C. M. O. 50 of 1873.

6. G. C. M. O. 24 of 1873.

7. See the G. C. M. O. last cited. More recently, however, it has been employed at Fort Leavenworth as a punishment for convicts tried under Sec. 1361, Rev. Sts. See G. C. M. O. 3, Dept. of the Mo., 1878, imposing dark cell on bread and water.

8. G. C. M. O. 68 of 1867; Do. 24, 50, of 1873. In G. O. 287, Navy Dept., 1882, this punishment, and also "solitary confinement on diminished rations," are condemned, and it is declared that they 'will hereafter be disused.'

ion with solitary confinement, and the Regulations, (par. :scribe for it the same limits as to duration.

ınd Chain. This punishment, still recognized as legal ırmy Regulations, (par. 896,) has been adjudged in sen- rom an early period, generally in cases of soldiers con- f desertion, or of aggravated offences characterized by , and in connection with the punishment of imprison- In some instances it has been imposed continuously for riods—in one instance indeed for and during an entire five years' confinement.[1] In another class of cases this has been awarded for a portion or portions only of the the sentence,—as for the "first twenty days of each of a term of five years' confinement,[2] or the "first week three months" of a term of one year,[3] or for "each alter- k" of a confinement "during the continuance of the t."[4]

been remarked in a General Order[5] that whenever ball- n is imposed, the sentence "should state the weight of the length of the chain, and how to be attached." In the court has generally fixed the weight of the ball[6] at to forty, (most frequently perhaps twenty-four,) pounds, length of the chain at from three to six feet, and has that the latter should be attached sometimes to the right ıkle and sometimes to the left. In certain of the cases ht indicated is that of ball and chain combined; in others ı is directed to be of a "convenient" length; in others ified simply that the party is to be confined "with ball in." In an early instance, a part of the sentence is— r a ball and chain attached to his *neck* for two weeks."[7]

; part, however, of the sentence was remitted. G. C. M. O. 65.

C. M. O. 595 of 1865.

C. M. O. 651 of 1865.

C. M. O. 306 of 1865.

O. 8, Dix's Division, Baltimore, 1862.

ıell filled with lead has sometimes been indicated instead of a

O. of Jan. 26, 1814.

This punishment, however, though very frequently impo during the late war, is now comparatively rarely adjudged. T opinion was expressed by Judge Advocate General Holt that i was not a penalty to be resorted to except in aggravated cas and, in his reviews of the proceedings of court-martials whi directed it, he commonly advised that it be remitted except wh the offender was shown to be a violent person, or where atten to escape were to be expected and he could not otherwise b secured.[1]

VI. PROHIBITED AND DISUSED PUNISHMENTS.

As a part of the history of Military Punishment, it is pro here to make reference to certain penalties, formerly adjud by sentence of court-martial, but now either expressly *prohib* by statute, or *disused* in practice at least in time of peace.

Obsolete Penalties. Some of the military punishments of t Romans and early Germans have been mentioned in Chapter I In the early English Articles and contemporary Code of Gustav Adolphus are prescribed sundry punishments long obsolete, su as—Decimation, (where regiments were concerned in misbeh viour before the enemy;[2]) Beheading;[3] "To be drawn," (in con nection with the death penalty;[4]) To be drowned or buried, bou to the person killed, (a punishment for homicide;[5]) To have t tongue perforated with a red hot iron, (for blasphemy;[6]) Loss o the right hand, or of a hand;[7] Loss of an ear;[8] Running th Gate-lope;[9] To be "beaten through the quarters;"[10] To b

1. DIGEST, 449.
2. Arts. 60, 67, 73, of Gustavus Adolphus; Art. 8 of James II. A see Art. 13, Sec. VI, of Charles I.
3. Arts. 2, 7, 10, 20, 21, of Richard II.
4. Arts. 2, 9, 17, of Richard II.
5. Ordinance of Richard I.
6. Art. 1, Sec. I, of Charles I; Art. 4 of James II.
7. Ordinance of Richard I; Arts. 22, 29, 32, 33, of Gustavus Adolph
8. Arts. 8, 11, 24, of Richard II.
9. See Art. 122 of Gustavus Adolphus.
10. Art. 80 of Gustavus Adolphus.

:ed in the sea;[1] To perform the duty of scavenger;[2] To for-
ıis horse,[3] or his horse and armor.[4]

American Law. In our law, of the class of *prohibited* shments are Flogging, and Branding or Marking; of *dis-* punishments are Weight carrying, Wearing of irons, Shaving ıe head, Placarding, Standing on or carrying a barrel, and a :ty of other forms of corporal punishment.

ogging—*The law on the subject.* Our original code of , in enumerating—in Art. 51—the punishments authorized : imposed by courts-martial, specified—"whipping, not ex- ng thirty-nine lashes," and in the "Additional Articles" of year, certain offences were declared to be punishable with : less than fifteen" (or "twenty") "nor more than thirty- lashes." In the code of 1776, it was provided, by Art. 3 of XVIII, that 'not more than 100 lashes should be inflicted on ›ffender at the discretion of a court-martial.' To the same was Art. 24 of 1786; a proposition to extend the limit to 500 s having meanwhile—in 1781—been rejected by Congress.[5] blic whipping was also authorized by certain statutes of this d as a punishment for sundry *civil* offences—as, by the Act pril 30, 1790, c. 9, for larceny, embezzlement, &c., the limit ; fixed at "thirty-nine stripes," and by the Act of March 2, c. 43, for robbing the mail, &c., the limit being forty lashes. ıs finally abolished as a punishment for civil offences by the ›f Feb. 28, 1839, c. 36, s. 5.

the military code of 1806, the 87th Article fixed the maxi- of this punishment at fifty lashes; but, a few years after, ı Act of May 16, 1812, this provision was expressly repealed, vhipping or flogging for the time done away with. By the however, of March 2, 1833, this form of discipline was re-

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Ordinance of Richard I.

Art. 40 of James II. And see Arts. 60, 72, 79, of Gustavus Adol- Art. 13, Sec. VI, of Charles I. The doing of "police duty," :er, though no longer adjudged by sentence of court-martial, is imes, though not always legally, imposed as a measure of discipline.

Arts. 4, 11, 24, of Richard II.

Arts. 5, 6, 8, 13, 14, 15, 23, 26, of Richard II. And see Arts. 1, Same, as to penalty of forfeiture of goods and heritages; also Arts. 68, of Gustavus Adolphus, as to confiscation of goods.

Jour. Cong., 634.

vived for cases of *deserters.* At length, at the beginning of late war, by a statute of Aug. 5, 1861, it was enacted—"*that j ging, as a punishment in the Army, is hereby abolished.*"

The code of 1874—in Art. 98—merely states the existing in regard to flogging, in enacting that—"*No person in the mil service shall be punished by flogging, (or by branding, mar or tattooing on the body.)*" An Article of the Naval Code- 49—is expressed in almost identical terms. By Sec. 1354, Sts., it is forbidden to subject to whipping a prisoner at the Leavenworth Military Prison.[1]

In the British law, flogging is no longer authorized to b judged as a punishment by courts-martial,[2] though it may b ployed as a corrective, to the extent of twenty-five lashes, at tary prisons.[3] For some *civil* offences—mainly violent assau it may legally be inflicted to the extent of not more than lashes at one time.

As heretofore administered. The disrepute into w this punishment has fallen is in great part due to the fact formerly, in the British service, it was carried to a brutal perilous extreme. "Five hundred lashes" was a not uncom sentence; one thousand were imposed in repeated recorded c and fifteen hundred and even two thousand were somet reached.[4] The execution of such sentences, while savage i cruelty to the subject, was demoralizing to those who inflicted who witnessed it. The offender being secured in an unna position, the lashes were applied by an enlisted man, (a "r and-left-handed drummer" being preferred,) with the "cat," thongs sometimes steeped in brine or salt and water,) upon bare back and shoulders which soon became flayed and raw. victim was not relieved till the surgeon pronounced that he endured as much as could safely be inflicted for the time. was then removed to the hospital, to be brought out again, w

1. The whole Sec. is—"*In no case shall any prisoner be subject whipping, branding, or the carrying of weights for the purpose of pline, or for producing penitence.*"

2. Army Act § 44.

3. Army Act § 133, (2.)

4. See 2 McArthur, Table of Trials in Appendix; Hough, 80, 9 100, 103, 105, 110, 147–8, 643–4; Id., (P.) 3, note; Col. Quentin's Table op. p. 218; Grant *v.* Gould, 2 H. Black. 72; Warden *v.* Bail Taunton, 67.

wounds were partially healed, for a second instalment of the nishment, and this process was repeated till the whole num- r of lashes had been administered. The sufferer, however, metimes perished under the blows, or in consequence of the uries received, before the law had been fully vindicated.[1]

in consequence no doubt of these extreme proceedings, and the t that the employment of this punishment, subject as it was ibuse, became the occasion of suits in which heavy damages re recovered,[2] the authority to resort to the same was gradu- r restricted by the Mutiny Act till, in 1832, the maximum was d at 200 lashes.[3] In 1868 it was abolished for time of peace, in 1881 altogether, (except as above indicated.) As a pen- r to be resorted to in moderation, it has not been without its ocates among English writers.[4] In the *American* service, nparatively few sentences of flogging were adjudged[5] until r the punishment had been revived for deserters in 1833, en the same was frequently resorted to,[6] especially during the iod of the Mexican war. By reason of the legislation of Au- t, 1861, it was scarcely employed in our late war. An instance sentence, approved, of fifty lashes is found in a General Order July, 1861:[7] a similar one adjudged by court-martial in Feb- ry, 1862, (the last case of the kind discovered by the author,) disapproved by the reviewing authority on account of the vious abolition of the punishment.[8]

. See Napier, 150–1, 159–60, 163–4; Stocqueler, (Hist. Brit. Army,) –6; Gov. Wall's Case, 28 Howell S. T., 57, 157; De Hart, 244–247.

. Grant *v.* Gould, Warden *v.* Bailey, Gov. Wall's Case,—*ante;* nyn *v.* Sabine, 1 Cowper, 169.

. Clode, 1 M. F., 155.

. McNaghten, 222–232; Harcourt, 28–9, 31; Napier, 188: Clode, l. F., 155.

. See instances in G. O. of May 9, May 31, Aug. 11, and Dec. 26, of 9; Do. of Nov. 5, 1811. These are in the interval between the en- ment of the code of 1806, and the original abolition of the punishment 812. In the case of Col. Wm. King, 4th Infy., (G. O. of Feb. 7, 0,) one of the offences of which the accused was convicted was the roving and executing of sentences imposing flogging, in violation of Act of 1812.

. In G. O. 45 of 1841, Gen. Scott mitigates several sentences of fifty es with a "*cowskin*" to thirty, on the ground that the "instrument" ed is deemed much severer than a "cat o' nine tails."

G. O. 32, Dept. of Washington.

G. O. 16, Dept. of Kansas. Similar action was taken about the

Branding or Marking—***As now prohibited.*** This p ishment, as heretofore remarked, is prohibited by Art. 98, wh is but a reiteration of the provision of sec. 2 of the Act of Jun 1872, (the only previous legislation on the subject,) by whic was declared that—"*hereafter it shall be illegal to brand, m or tattoo on the body of any soldier by sentence of court-marti* This provision is inadvertently repeated in Art. 38. Markin the *British* service was abolished in 1871.

As heretofore administered. The marking of dese with the letter "D" dates from the Roman law,[1] and was au ized by the British Mutiny Act at an early date.[2] Later, Act also authorized the marking of offenders discharged ignominy, with the letters "B. C." (Bad Character.[3])

In our service this punishment has been carried conside farther, additional forms of it having been sanctioned by t Soldiers have been sentenced to be branded, as well as ma with D, both for desertion and for drunkenness. The mar commonly been placed on the hip,[5] but sentences to be br on the cheek[6] and on the forehead[7] have been adjudged. markings imposed by our courts have been H D for ha drunkard,[8] M for mutineer,[9] W for worthlessness,[10] C for co

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same time, in G. O. 31, Dept. of the Mo., 1862, in a case tried by n commission. And see case in G. C. M. O. 64 of 1865, noted "Disciplinary Punishments," *post.*

1. Vegetius, De Re Militari, p. 1, c. 8.

2. The marking, as adjudged by the court-martial, was requir an army regulation, "invariably to be performed under the pe superintendence of a medical officer."

3. Simmons § 119, note.

4. The branding, however, was of rare occurrence compared wi marking.

5. "To be marked with the letter D on his right hip" is reco as a legal penalty, as adjudged by sentence of a *naval* court-mart IX Opins. At. Gen., 80. In a case in an Order of April 4, 18 soldier is sentenced to be marked with D "on both thighs."

6. G. O. 65, Dept. of the East, 1864. Here the sentence is mit by the reviewing authority to a branding on the hip.

7. G. O. of Feb. 1, 1814.

8. G. O. 35 of 1838; Do. 31, Army of Occupation, 1846.

9. G. O. 81 of 1833; G. C. M. O. 513 of 1865.

10. See Order last cited; also G. O. 66, Dept. of Washington. Do. 14, Dept. of the East, 1868.

I for insubordination,[2] R for robbery,[3] and T for thief.[4] times also entire words were required to be marked as erter,"[5] "Habitual Drunkard,"[6] "Mutineer,"[7] or "Swin-[8] The branding was done with a hot iron; the marking India ink or gunpowder, usually pricked into the skin or ed.

s species of punishment, except in so far as necessary or ent in cases of *deserters*, was repeatedly during the late ıfavorably commented upon by Judge Advocate General ıs being "against public policy" and "not conducive to st interests of the service." These views were repeated er authorities, until Congress took the matter into consid-ı, and at length, by the enactment already cited, prohibited unishment altogether.

ısed Punishments[9]—***Carrying weights.*** Among the ısual of the punishments by sentence, now practically dis-was the carrying of weights, which consisted mostly in ing for a certain time, in front of the guard-house, on the , on a ring, &c., carrying a loaded knapsack, (loaded with sand, &c.,) a log, a fence-post, or other weighty article; ight, (commonly 25 or 30 lbs.,) being generally prescribed sentence.[10]

ıring of irons. This has been in some cases so imposed sentence as to amount to a distinct punishment. The fol-

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. C. M. O. 107, 115, 126, of 1865.

. O. of Jany. 6, 1862.

. O. 45, Dept. of So. Ca., 1866.

. O. 2, Dept. of the East, 1868; Do. 6, First Mil. Dist., 1868.

. O. 25, 48, of 1827; Do. 29 of 1835.

. O. 25 of 1827.

ee Order last cited.

. O. 59 of 1826; Do. 34 of 1827.

one of the punishments indicated under this head are mentioned ist of legal punishments for soldiers contained in par. 896, Army tions. Viewing this paragraph, however, as applying, strictly, of *peace* only, some of these "disused" penalties may perhaps y be revived in a time of *war*.

n a recent order—G. C. M. O. 10, Dept. of the Mo., 1885. the Commander, (Gen. Augur,) in disapproving so much of a sentence

wing forms may be cited from the General Orders:—"To b well ironed with handcuffs and leg-irons,"[1] (in connection wit confinement;) To be confined "in double irons;"[2] "To be se to his regiment in irons;"[3] "To be sent in chains to the D Portugas."[4]

Shaving of the head. This has already been noticed as in posed in some instances as a mark of ignominy in connectio with Dishonorable Discharge. The sentence has sometimes d rected that the head be "half-shaved;"[5] also, that it be "clos shaved" and a "pitch canvas cap" worn upon it.[6]

Placarding. Standing or marching for a certain time bea ing a placard or label inscribed with the name of the offence—s "Deserter," "Coward," "Mutineer," "Marauder," "Pillager," "Thief," "Habitual Drunkard"—was at one time a not uncom mon punishment. In some cases the inscriptions were more ex tended,—as "Deserter: Skulked through the war;"[7] "A chicken thief;"[8] "For selling liquor to recruits;"[9] "I forged liquor or ders;"[10] "I presented a forged order for liquor and got caught at it;"[11] "I struck a non-commissioned officer;"[12] "I robbed the mail—I am sent to the penitentiary for 5 years;"[13] "The man who took the bribe from deserters and assisted in their escape."[14]

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as required *walking in a ring and carrying a log*, adds:—"Such pun ishment is a great waste of man power; something useful ought to be found for prisoners to do instead of such idle exercise."

1. G. O. 72 of 1832.

2. G. O. 103 of 1832. "Double irons" have been much more fre quently employed in the Navy, in cases in which the confinement has to be executed on board a vessel.

3. G. C. M. O. 173, 195, of 1864.

4. G. O. 33, Northern Dept., 1864.

5. G. C. M. O. 23 of 1867; Do. 6, 36, of 1868.

6. G. O. of Feb. 1, 1814. Compare Ordinance of Richard I, in Ap pendix.

7. G. C. M. O. 451 of 1865.

8. G. O. 23, Dept. of the Pacific, 1866.

9. G. C. M. O. 7, Army of the Potomac, 1865.

10. G. O. 15, Dept. of Va. & No. Ca., 1865.

11. G. O. cited in note 7.

12. G. O. cited in note 7.

13. G. C. M. O. 58 of 1866.

14. G. O. 76, Dept. of the East, 1864.

ding on a barrel, &c. Soldiers have been not unfre-
sentenced, for minor offences, to stand on the head of a
or certain periods, sometimes also bearing a placard. An-
nishment by the use of a barrel was—"to carry a barrel
s head through a hole in one end, and resting on his
rs."[1]

r *punishments.* Less usual were such punishments as
owing:[2]—Riding the wooden horse,[3] (sometimes with
ied behind the person, or a musket tied to each foot;)
g a wooden jacket; Wearing an iron collar or yoke;[4]
g party-colored clothes, or Marching with coat turned
ide out; Bucking; Picketing; Tarring and feathering;[5]
[6] Stocks; Gagging; Fasting; Tying up by the thumbs;
g 'grog,' or 'ration of whiskey.'[7]

VII. REMARKS WITH SENTENCE.

s been indicated in the last Chapter, a court-martial may,
ection with its Sentence, as with its Finding,[8] present
imadversions, recommendations, explanations, or other
, as it may deem properly to be called for. Thus it may
it unfavorably upon the accuser or prosecutor;[9] may rec-

O. 8, Dept. of the West, 1861; G. C. M. O. 58 of 1866.

these punishments, 'bucking' and 'tying up by the thumbs,'
en specially condemned as "not warranted by law or usage."
O. 80 of 1842; Do. 3 of 1853; Do. 44, Dept. of the Platte, 1871;
ept. of the South, 1873.

s punishment is prescribed in Arts. 43 and 49 of Gustavus
s, and Arts. 30 and 34 of James II.

comparatively recent instance of this punishment, to wit—'to
iron yoke weighing nine pounds, with three prongs six inches
found in G. O. 38, Army of the Potomac, 1861.

posed in connection with Dishonorable Discharge. See instances
34 of 1827; Do. 29 of 1835.

Ordinance of Richard I, (see Appendix,) it is prescribed that
icted of theft "shall have his head cropped * * * and boil-
n shall be poured thereon, and then the feathers of a cushion
shaken out upon him."

plished as a punishment for *civil* crimes by Act of Feb. 28, 1839,
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O. of April 19, 1814; Do. of June 7, 1817.

Chapter XIX.

O. 3 of 1853. See Chapter XIX—"Additions to the Finding."

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ommend that an officer or soldier, (other than the accu promised by the evidence, be brought to trial;[1] may r certain action, discipline, or want of discipline, develo testimony, &c. It is not uncommon for a court, in adj unusually mild sentence, to add that it is 'thus lenient' of certain circumstances mentioned—as that the accuse dergone a long confinement in arrest before trial, or h good character or rendered valuable services prior to his has voluntarily surrendered himself from desertion, or captured and imprisoned by the enemy, or is young or enced as a soldier, or physically or mentally deficient, &c court may explain an exceptional sentence by a statem conclusions from the testimony, or an expression of it of the amount of criminality involved in the case, or o But in general it will be more military and dignified on t the court to abstain from any remarks which may have of an excuse rendered for its action. Where some mat ceeding, or the general course of proceeding, has been but justified by the peculiar character of the case, it w objectionable for the court to state the reason for the connection with the sentence. As was done by the co trial of Lt. Col. Fremont, where the great mass of evi mitted was accounted for on the ground that, in vie variety and complication of the circumstances surrou alleged offences, it was deemed proper to allow the full to the defence.[4]

Recommendation. Where a severe sentence, made tive by a mandatory provision of the code, has been adj the court, or—though more rarely—where a severe disc sentence has been imposed, the members, or a portion sometimes join in a *recommendation*, *i. e.* a written statem mending the accused, for reasons stated, to the clemen reviewing authority.[5]

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1. G. O. 45, Dept. of Washington, 1866.

2. See G. O. 20, Dept. of the South, 1866; Do. 115, De Mo., 1867; Do. 47, Dept. of the Lakes, 1868; Do. 8, Dept. of 1874; G. C. M. O. 10 of 1883; Hough, 488.

3. See the explanations of the sentences of admonition and r in G. O. 250 of 1863; G. C. M. O. 212 of 1866.

4. Printed Trial, p. 338.

5. Unfavorable recommendations—as that the accused be

This statement is not a proceeding of the court, and no part of e record of the trial. It is therefore not properly incorporated th or added to the sentence,[1] but, in practice, is usually appended the record as a separate paper. It may indeed form the subct of a distinct official communication to the reviewing comander or pardoning power, and this is the form which it usually kes in the French and German procedure.[2]

Being the act, not of the court, but of the members who take art in it,[3] the recommendation may be subscribed by all the embers, or by a majority or minority, or by one member only. here may be two or more recommendations, signed by different embers, and on different expressed grounds.[4] The judge advote may properly join in a recommendation.

A recommendation should not omit to state the reasons upon hich it is based.[5] Among the grounds generally advanced have een—the previous military services of the offender, his general ood character, his youth or inexperience, the fact that he has een held for an unusual period in arrest or confinement awaitng trial, or that he is in infirm health, the absence in his case f a deliberate criminal intent, &c. A recommendation should roceed upon *facts*—mainly or entirely upon facts in evidence n the trial. It should not be actuated by the personal feelings

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r discharged, though recognized in the British, (see Hough, (P.,) 762; Hughes, 99; Bombay R., 41,) can scarcely be said to be sanctioned in our practice.

1. See Army Regs., par. 916. So, in the civil practice, a recommenation to mercy by a jury is no part of the verdict, but only a communiation addressed to the judge. People *v.* Lee, 17 Cal., 76.

2. In Marshal Bazaine's Case, in 1873, after the court had agreed pon the death sentence, seven of the ten members addressed a comunication to the President of the Republic recommending a commutaon of the punishment, which was commuted accordingly to twenty ears' imprisonment in a fortress.

3. "Those members only who concur in the recommendation will gn it." Army Regs., par. 916. And see DIGEST, 411.

4. In a late case, in G. C. M. O. 92 of 1875, there were two separate ecommendations, one being signed by a single member.

5. In a case in G. O. 70, Dept. of Dakota, 1870, it is remarked by the eviewing officer, Gen. Hancock, as follows:—"As the members of the ourt are silent with regard to the considerations by which they were fluenced in making their recommendation in the prisoner's behalf, it is possible for the reviewing authority to determine whether their reaons for making the recommendation were sufficient to justify a mitigaon of the sentence. No consideration can, therefore, be paid to it." nd see G. O. 27, Div. of the Atlantic, 1874; Hough, (P.) 793.

of the members, whether feelings of partiality toward t cused or of disfavor toward the prosecutor.[2] It should of not disclose opinions on the question of guilt or inno Further, it should not assume to dictate, or to suggest, reviewing authority what mode or measure of clemen properly be resorted to in the case.[3]

It seems to be the sentiment of the authorities that rec dations are not much to be encouraged.[4] They have inde characterized in some instances rather by a weakly lenient porizing spirit than a sound appreciation of the circumsta merits of the case; in others they have been so materiall sistent with the findings and sentence as to detract ma from their weight. In a proper case, however, a recom tion, especially if signed by all the members, will be duly d to, as being in effect a qualification of the sentence.

VIII. DISCIPLINARY PUNISHMENTS.

Not Authorized by Law. The different specific pe which have been considered in this Chapter practically e the power to punish conferred by our military law. We h that law no such feature as a system of disciplinary p ments[5]—or punishments imposable at the will of milita manders without the intervention of courts-martial—such generally found in the European codes. Except in the mentioned in two or three unimportant and obsolete Artic

1. See James, 619.

2. See Benét, 145.

3. James, 527, 528; Simmons § 698; Kennedy, 211; De Hart, Coppée, 85.

4. The Secretary of War is "surprised to find that any officer o court could recommend remission or commutation of the sentence case where the conduct of the officer tried was as reprehensible as of the accused. G. C. M. O. 92 of 1867. "The practice of the m bers of a court-martial first finding an officer guilty, and then re mending him for clemency, is to be deprecated. It is an endeavor frequently made, to transfer the responsibility of their finding to Department of War when it should rest upon the court itself." G 30 of 1843. And see Do. 39 of 1845; Do. 26 of 1851; Do. 342 of 1 G. C. M. O. 27 of 1871.

5. It is quite otherwise in the Navy. See Art. 24 of the code of ticles for the Government of the Navy, Rev. Sts., Sec. 1624. In British Navy, where a similar authority exists, "courts-martial," according to Clode, (M. L., 44,) "are seldom resorted to." The p of summary punishment accorded to naval, but denied to army,

ur law recognizes no military punishments other than such be adjudged as the result of a trial and conviction by a y court.

Sanctioned by Usage. By the authorities nothing is learly and fully declared than that *punishments* cannot le- e inflicted at the will of commanders—that they can be ad- ered only in execution of the sentences of military courts.[2] punishments, whether ordered by way of discipline irre- e of arrest and trial, or while the party is in arrest awaiting r between trial and sentence, or after sentence and while ig transportation to place of confinement, or while he is un- tence and in addition to the sentence,—have been repeat- nounced in General Orders and the Opinions of the Judge ate General,[3] and forbidden in practice by Department

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s, is analogous to the authority to chastise or punish disorderly obedient seamen in the merchant service. See Turner's Case, 1 77; Bangs *v.* Little, Id., 520.

the summary power of disciplinary punishment now vested in nding officers of the army in the British Law, see Manual, 35, my Act, ss. 46, 138; Queen's Regs., Sec. VI.

rts. 25, 52 and 53. The nearest approach, however, to a disci- punishment in our law is the reducing of non-commissioned offi- *order*, under par. 172, Army Regulations. But this may be d to for purposes quite other than punishment.

e Hart, 218; O'Brien, 487–8; DIGEST, 451, and Orders cited in ling notes.

No officer has the authority in any case to inflict punishment for ences of any kind. This authority is possessed by courts only." pencer, Sec. of War, in G. O. 4 of 1843. And see Do. 81 of 1822; of 1824; Do. 28 of 1829; Do. 25 of 1840; Do. 53, 80, of 1842; Do. 43; Do. 39 of 1845; Do. 31, Div. of the Atlantic, 1873, (where to solitary confinement before trial is declared "clearly illegal;") Dept. of the South, 1873; Do. 23, Id., (where the inflicting of a nent—without trial—on a soldier *when drunk* is especially disap- by Maj. Gen. McDowell;) G. C. M. O. 90, Dept. of the East, 1871, a soldier, for disorderly conduct in ranks under liquor, was or- o carry a fence-post, and on refusal was gagged and subsequently d with ball and chain and in irons till brought to trial—action se- condemned by the same commander;) Do. 71, Dept. of Dakota, DIGEST, 66, 286, 428, 437, 451–2, 469. In G. C. M. O. 195, Dept. ota, 1883, the requiring of a soldier, confined in the guard-house rial, to perform unusual police work, was held unauthorized. In 3, Dept. of Va. & No. Ca., 1864, the striking, &c., of *colored* without sufficient cause is especially reprobated; these troops locile and obedient if properly treated and set a good example. mpare case of Lt. Col. Broughton, an officer of a "black corps" Vest Indies, James, 261. See also G. O. 148, Navy Dept., 1869; 3, Id., 1872; Do. 217, Id., 1876—where the transcending of the

commanders.[1] Officers who have resorted, or authorized inferiors to resort, to them have not unfrequently been brought to trial and sentenced, sometimes to be dismissed:[2] if acquitted or lightly sentenced, the proceedings have in general been disapproved or severely commented upon.[3] On the other hand, enlisted men tried and sentenced for insubordinate conduct, where such conduct has been induced or aggravated by illegal corporal punishments inflicted upon them by superiors, have commonly had their sentences remitted or mitigated, or altogether disapproved.[4]

The practical result is that the only discipline in the nature of punishment that, under existing law, can in general safely or legally be administered to soldiers in the absence of trial and sentence is a *deprivation of privileges* in the discretion of the commander to grant or withhold, (such as leaves of absence or passes,) or an *exclusion from promotion* as non-commissioned officers, together with such discrimination against them as to selection for the more agreeable duties as may be just and proper.[5] To vest in commanders a specific power of disciplinary punishment, express legislation would be requisite.

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authority of summary punishment by naval commanders is severely commented upon by the Secretary of the Navy.

It may be noted here that, by the authority of *express statute*—Sec. 1353, Rev. Sts.—a *convict* at the Leavenworth Military Prison, offending against discipline, may be subjected to solitary confinement.

1. G. O. 23, Dept. of the Lakes, 1870; Do. 44, Dept. of the Platte, 1871; Do. 7, Dept. of the Gulf, 1872; also Orders cited in last note.

2. See G. O. of Feb. 7, 1820, (case of Col. Wm. King;) Do. of June 30, 1821, (case of Col. Talbot Chambers, sentenced to suspension for inflicting illegal punishment in "cropping" the ears of two soldiers;) Do. 23 of 1824; Do. 8, 20, of 1826; Do. 28 of 1829; Do. 25, 47, of 1830; Do. 64 of 1832; Do. 34 of 1842, (Capt. Howe's Case;) Do. 2, 4, 17, of 1843; Do. 39 of 1845; G. C. M. O. 645 of 1865; Do. 112, Dept. of the East, 1870; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 9, Div. of the Atlantic, 1869; Do. 14, Dept. of the South, 1869; G. C. M. O. 50, Dept. of the Mo., 1871; Do. 30, Id., 1883; Do. 37, Dept. of Texas, 1880; Do. 5, 6, Id., 1885; Do. 2, 6, Dept. of Arizona, 1883; Hough, 465; Id., (P.) 400. And see G. O. 168, Navy Dept., 1872; Do. 217, Id., 1876. Note also, in this connection, the case in G. C. M. O. 64 of 1865, of a Brig. Gen., convicted of causing two soldiers to be flogged with 39 lashes each, as a disciplinary punishment, and sentenced to suspension. The findings and sentence were however disapproved.

3. G. O. 4, 64, of 1843; Do. 2 of 1844; Do. 39 of 1845; Do. 22, Dept. of the Platte, 1867; G. C. M. O. 112, Dept. of the East, 1870. And see G. O. 9, Div. of the Atlantic, 1869; Do. 5, Id., 1870.

4. See G. O. 49, 76, Northern Dept., 1864; Do. 40, Dept. of the East, 1868; G. C. M. O. 90, Id., 1870; G. O. 63, Dept. of Dakota, 1868; Do. 76, 106, Id., 1871; Do. 93, Dept. of the South, 1873.

5. See G. O. 7, Dept. of the Gulf, 1872.

nmary Discipline in cases of Emergency. Cases ndeed sometimes arise in the military service when a or is called upon to employ toward an inferior a degree ility of force not in general permissible. As where he uired to defend himself against an assailant, to suppress iny, to quell a dangerous offender or quiet a turbulent o overcome resistance made to an arrest, to secure a sol- ttempting to desert, or to capture a prisoner escaping custody:—in such instances the superior may in general to the necessary personal force, use of arms, imprison- ironing, or other available form of constraint,[1] and in *e* cases may even be warranted in taking life.[2] Especially e of *war*, and when the command is before the enemy, will rcible and vigorous measures be justified.[3] This, however, *ression* and *restraint*, not *punishment;* no greater force or severe restriction is therefore to be employed than may be able and needful under the circumstances; and where the nder is provided with the usual or with adequate facilities prehending and confining an offender with a view to trial, ot, even in time of war, to inflict personal chastisement him or subject him to any arbitrary punitory treatment, less, by the use of arms, to put him in danger of his life.[4] lating these rules the superior subjects himself to charges al by court-martial,[5] as well as to civil suit or prosecution.[6]

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ee G. O. 81 of 1822; Do. 53 of 1842; Do. 2, 4, of 1843; Do. 21 of Do. 3 of 1853; G. C. M. O. 47 of 1877; Do. 53, Dept. of Va. & ., 1864; Do. 40, Dept. of the East, 1868; G. C. M. O. 112, Id., Do. 90, Id., 1871; G. O. 23, Dept. of the Lakes, 1870; Do. 106, f Dakota, 1871; Do. 1, 93, Dept. of the South, 1873; Do. 31, Div. tlantic, 1873; G. C. M. O. 37, Dept. of Texas, 1880; DIGEST, 452.

. C. M. O. 47 of 1877; G. O. 29, Dept. of N. E. Va., 1861; Do. 5, f N. Mexico, 1863; Do. 54, Dept. of So. Ca., 1865; Do. 25, Dept. 1866; U. S. *v.* Carr, 1 Woods, 484; DIGEST, 314.

IGEST, 314; Clode, M. L. 117, 118.

. O. 54, Dept. of So. Ca., 1865; Do. 40, Dept. of the East, 1868; 1. O. 112, Id., 1870, (Remarks of Maj. Gen. McDowell;) G. O. of the Atlantic, 1870; G. C. M. O. 45, Dept. of Dakota, 1880. o Do. 93 of 1867; Do. 36 of 1880; DIGEST, 452. And compare t maritime law—as Turner's Case, Ware, 77; U. S. *v.* Freeman, n, 505; Perkins *v.* Hill, 1 Sprague, 119.

An excess wantonly committed would itself be punishable in the r." Maj. Gen. Scott, in G. O. 53 of 1842. And see cases in cited in the previous notes under this head.

ee under PART III.

CHAPTER XXI.

ACTION ON THE PROCEEDINGS—THE REVIEWING AUTHORITY.

The next Requisite. While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him.[1] This superior, sometimes referred to as the Approving or Confirming Authority, but more commonly known in military parlance as the Reviewing Authority or Officer,[2] is, as will presently be more fully indicated, the official—military commander or Commander-in-chief—by whom the court was originally constituted and convened, or—where there has been a change in the command since the convening—his successor therein. In some cases indeed where, beside the approval of the original commander, further confirmatory action by a higher commander or the President is required by law, there are in fact, as will also be pointed out, two separate reviewing officers.[3] It is the function of such officer (or officers) which we now proceed to consider.

The Law on the Subject.[4] The provisions of our statute law which relate to the authority and action of the "Reviewing

1. See Tytler, 103, 160, 227; Kennedy, 212, 217; Simmons § 709; Macomb, 33; DIGEST, 435; V Opins. At. Gen., 511. A sentence is "interlocutory and inchoate" till duly approved. Mills *v.* Martin, 17 Johns. 30.

2. The term "Reviewing Authority" occurs in Sec. 1228, Rev. Sts.

3. DIGEST 386, 435.

4. By the earlier statutes—Art. 67 of 1775; Arts. 8 of Sec. XIV and

the approving and confirming, &c., of sentences and and in the executing, pardoning and mitigating of s, are contained in Articles 104 to 112 of the code, :he execution of the sentences of courts for the trial Sec. 1326, Rev. Sts. These provisions, with a few lations and some usages of the service relating chiefly n of proceedings to the court for correction, the for- d publication of the final action taken thereon, and the position of records of trials, constitute the law on the his Chapter. Art. 110, which refers to the action on f Inferior Courts, will be more specifically noticed in XII. The matter of the execution of *particular pun-* s already been remarked upon in the preceding Chap- ot as thus treated, the present subject will here be nder the heads of—

proval or Disapproval of the proceedings.
turn of the proceedings for correction.
tion of the President as confirming authority.
tion of commanding general as confirming authority.
ecution of sentences.
spension of execution of sentences.
rdon and mitigation of punishments.
rmulating of action and promulgation.
sposition of records.

AL OR DISAPPROVAL OF THE PROCEEDINGS.

l—*Art. 104.* Upon this subject this Article provides "*No sentence of a court-martial shall be carried into ntil the whole proceedings shall have been approved by dering the court, or by the officer commanding for the*

III, of 1776; Resolutions of April 14, May 27 and June 18, t. 2 of 1786; and Arts. 65 and 89 of 1806—the general in bsequently the general commanding in the State, and the of separate departments and armies, were authorized to act officers. Prior, however, to the adoption of the Constitu- ss itself, in which then resided the executive power of the not unfrequently exercised the power of finally acting upon ngs of general courts-martial and of remitting and mitigating es. See cases in 3 Jour. Cong., 37, 144, 158, 386, 714; 4 Id.,

Significance of term "Approved." This word, as tech nically construed in practice, designates the fact of the offi acceptance of and concurrence in the proceedings as a whol including the sentence, by the reviewing authority. Art. 109 u the word "confirmed" as describing the ratification of the se *tence*, and it would indeed be in general more strictly precise t speak of the proceedings (except the sentence) as approved, a of the sentence as confirmed.[1] In practice, however, no essenti difference in meaning is recognized between the two terms,[2] b both are often indifferently employed in reference to the se tence. Inasmuch, however, as "confirmed" is the word used i Arts. 105–108 to describe the action of the President, (or oth superior authority,) in cases where his action is required upon t sentence in addition to that of the original reviewing authori this term has come to be more commonly reserved for the desig tion of such action, while "approved" is more usually employ to indicate the action of the original commander—the comman of the department for example—by whom the court was order (or his successor, if there has been a change in the comman The two terms will accordingly thus be distinguished in th Chapter, and generally throughout this treatise.

In exceptional cases, reviewing officers, in acting upon a se tence, have declared of the same that it was "confirmed but n approved," the intent being to impart the mere official asse necessary in law to the execution of the sentence while withhol ing personal approbation of the same or of the proceedings findings upon which it is based. Such a distinction, howeve in giving to the two words the one a technical and the other colloquial meaning is a departure from established usage and wi out legal significance.[3]

Approval as an Essential. By Art. 104 the official approv of the convening commander, (or his successor,) is made an essen tial requisite to the taking effect of the sentence, both in case

1. In some cases the expression "approved *and* confirmed" has bee adopted in passing upon proceedings and sentence together, but th has been more common in the British service, (see James' Precedents, than with us.

2. O'Brien, 277; De Hart, 111–112.

3. Simmons, (§ 730,) observes of the term "confirmed but not ap proved," that its "legal effect differs in no degree from an approval."

: such approval is final and conclusive *per se*,[1] and where
:r action is necessary to supplement it. In other words, it
.ally essential where the sentence, in order to be executed, re-
s the subsequent confirmation of superior authority, (as in the
specified in Arts. 105–108,) as where the same is fully exe-
. by the act of the original commander alone.[2] It is, similar-
prerequisite to the suspending of the sentence for the action
: President under Art. 111,[3] as also to the exercise of the power
rdon or mitigation of a punishment under Art. 112.[4]

ıat is to be Approved—*"The whole proceedings."* :erm, as employed in Art. 104,[5] would, strictly, include every
ıne, or caused or permitted to be done, by the court in the
: of the trial, and entered in the record, from the original
bling of the members to the final judgment or revision. In
ing, however, that the "*whole*" proceedings shall be ap-
d, &c., the Article does not accurately express what was
led.[6] The purpose of the Article evidently was to repeat,
abridged and compact form, a provision of the previously
ng 65th Art. of the code of 1806, which directed that the
ıle proceedings" should be "laid before" the reviewing
· prior to his approval or action. It could not have been
ıed in the present Article to make the approval of the *entire*
:dings of the court an essential to the legal execution of
ntence, since the reviewing officer might well disapprove,
ıneous or ill-judged, some interlocutory ruling not affecting
ıal conclusion, or some portion of the findings, or some one
re of several punishments awarded, while yet properly and
y approving the sentence or a punishment or punishments
.ced therein. The term "whole proceedings" must there-
e construed as meaning *material* proceedings, *i. e.* such as

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ee *post*—"V. Execution of sentences."

)IGEST, 89, 435; G. O. 27, Army of the Potomac, 1863.

)IGEST, 92, 435.

:. C. M. O. 101, Division of the Atlantic, 1874; Do. 66, Dept. of
885.

he same term is employed in Art. 110. See Chapter XXII.

)IGEST, 89. The Annual Report of the Judge-Advocate General
Secretary of War, of Oct. 20, 1878, recommended an amendment
Article, and a Bill for the purpose was introduced in the Senate
: finally acted upon.

are material to the legal enforcement of the sentence a: approved. And such has been the construction adopted tice since the code of 1874 went into operation.

By Whom to be Approved. The Article require: proval of the proceedings by "the officer ordering the co "the officer commanding for the time being."

"The officer ordering the court." This is of co officer who, by virtue of the authority vested in him by as already considered in Chapter VI, on the Constitution eral Courts-Martial, has originally convened the court b the sentence has been adjudged. In the great majority he is the officer by whom the sentence is approved or ot acted upon.

Extent of his discretion. Whether and how far t ceedings and sentence, or any part of the same, shall be ap &c., is a subject wholly within the discretion of such offic to this he is invested by the Article with the sole author cannot therefore be directed either by the President or ot perior. While deferring to any known views of a superi any question of law or discipline involved in the particul it is yet his duty as it is his right, in the exercise of the of approval or disapproval, to act according to his own be ment, and in the light of the facts and the law as underst held by himself.

Delegation of his authority. This officer must a sonally. He cannot delegate his function as reviewing au to another officer—as a staff officer or an inferior command act in his stead. If he assumes to do so, the acts of his d will be of no legal virtue.[1]

Effect of his absence from command. While th sonal presence of the commander within the territorial lin his command may not be absolutely essential to give vali his action as a reviewing officer, or the mere fact of his a therefrom sufficient to invalidate such action,[2] yet when absent on a duty or under orders practically detaching hi

1. DIGEST, 54, 90.
2. XVI Opins. At. Gen., 679.

ommand, or the effect of which is, in a military sense, prop- incompatible with its exercise, his power to act upon the :nces of courts-martial convened by him may be materially ted. Thus while a Department Commander, who has tem- rily passed the boundary of his department when pursuing ile Indians or engaged in some other service as such com- der, is not so absent from his command as to be disqualified ı taking the action required by Art. 104 or 109, it may be e otherwise where he is absent under orders placing him n a distinct and separate duty of some continuance, or by ne of a leave of absence for any considerable term.[1] Under such circumstances, indeed, it will in general be safest to de- ve the command temporarily upon some other officer, and for h officer to act as reviewing authority for the time being.

ffect of the absence of the accused. It cannot however ct the authority of the convening officer to approve, &c., the ceedings, that, since the trial, the accused may have been isferred with his company to another department, &c., or is erwise absent from the command, as by reason of having been en prisoner by the enemy or having deserted. The authority the commander having once attached to the case he still re- ins the reviewing authority whose formal approval is necessary the execution of the sentence, though the matter of its actual forcement may have to be directed by a superior or other com- mder.

"The officer commanding for the time being." This is officer who, by reason of the absence, removal, disability, &c., the officer who originally ordered the court, or the merger or continuance meanwhile of his command, has succeeded to the rcise of such command and is exercising the same at the time en the proceedings and sentence are completed and require to acted upon. Such officer will usually have been, temporarily indefinitely, detailed for the command by the President, (or r superior;) but, where no such formal detail has been made, none is required by statute or regulation to be made, he may n officer upon whom the command has devolved by reason

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DIGEST, 89–90; G. C. M. O. 26 of 1878. And compare DIGEST, . C. M. O. 9, Dept. of the Columbia, 1880; also Chapter VI—"Sus- on of the authority by absence, &c."

of his seniority in rank according to the usage of the ser
Upon duly assuming the command "for the time being,"
officer succeeds to all the rights of review and action which w
have been possessed by the convening authority had his exe
of the command not been interrupted.

It may be noted that the rank of such successor is not fixe
the Articles, and it cannot therefore be held to be essential
he should be of equal rank with the officer who convened
court, or of a rank sufficient to authorize him himself to con
such a court. Thus a department or an army commander, t
empowered to assemble a general court under Art. 72, must
general or a colonel, but "the officer commanding for the t
being," in the absence of any requirement as to his rank,
legally and effectually act upon and approve the proceedi
though,—as might be the case in time of war,—his rank be
than colonel.

Where, pending the proceedings in a case on trial, the c
mand of the convening officer has been discontinued and inclu
in a larger or other command, as where one department has b
merged in another or in a Division, the commander of the la
will be the authority answering to the description of "the offi
commanding for the time being," and will properly act upon
proceedings and sentence as indicated in Arts. 104 and 10
Where, under similar circumstances, the command of the co
vening officer has been discontinued altogether without bei
renewed in any form or included in another command, the Ge
eral, if any, duly assigned by the President to the command
the army,[3] will be "the officer commanding for the time being,"
or, if there be no authorized military commander of the enti
army, the President himself as constitutional Commander-in
chief.[4]

"The officer commanding for the time being" is invested wi
the same authority and discretion, and held to the same oblig
tion, in the exercise of the power of approval, &c., as would b
"the officer ordering the court" in whose stead he acts.

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1. DIGEST, 90.
2. DIGEST, 90.
3. See Chapter VI—"General officer commanding an army."
4. DIGEST, 90; Martin *v.* Mott, 12 Wheaton, 34.

Disapproval—*Its nature and effect.* "Disapproval," in litary law, is not a mere expression of disapprobation,[1] but a chnical term employed to indicate the action of the reviewing icer where he does *not approve* the sentence or a punishment. ich officer, wherever authorized to approve, may, instead, disprove; disapproval being simply the absence or withholding, ated in terms,[2] of the approval or confirmation which is necesry to the taking effect of the judgment of the court. As approval or confirmation vitalizes and makes operative the sentence a punishment, disapproval nullifies and vacates it.[3] Like approval, it may be full or partial, *i. e.* where a sentence imposes veral punishments, one or more may be disapproved, and the her or others approved; the disapproval of a part not affecting e validity or execution of the remainder.[4] Where the entire ntence is disapproved, the proceedings in the case are wholly rminated and nugatory; there remains therein no material upon hich the original reviewing officer, or the President or other perior authority whose confirmation would be necessary to the forcement of the sentence, can exercise the power of execution, r that of pardon or mitigation; and to transmit proceedings, for e confirmation of the sentence or other action by higher authority, when the sentence or judgment has been formally disapproved in the first instance, must be as futile as it is unauthorized.[5] Upon such a disapproval also the accused is restored *ex vi* his normal legal status as existing before his arrest, and is entitled to be at once released from any form of restraint to which may have been subjected, and to be returned to the duties and ghts of his rank or office; his legal rights and privileges remaining no more affected than if the trial had resulted in an acquittal.[6]

1. As to the action, commonly classed as "disapproval," but which is more than unfavorable comment upon proceedings of secondary imrtance, see *post*—"Disapproval not affecting the sentence."

2. That it must be *express*, see DIGEST, 436; XVI Opins. of At. Gen., 2.

3. G. O. 209, 341, of 1863; Do. 27, Army of the Potomac, 1863; Brien, 277; I Opins. At. Gen., 242; DIGEST, 435.

4. See G. O. 72, Dept. of the East, 1865.

5. DIGEST, 436.

6. "The effect of the disapproval is not merely to annul the sentence ut also to prevent the accruing of any disability, forfeiture, &c., which ould have been incidental upon an approval." DIGEST, 436. And see irc. 12 of 1883. The disapproval is "tantamount to an acquittal by the

Where the disapproval of the sentence is but partial, its effe is to nullify the punishment or punishments disapproved, leavin the other or others which are approved to be executed, remitted or mitigated, precisely as if the sentence had included this o these only.

Grounds of disapproval. The grounds upon which th authority to disapprove a sentence or punishment may properl be exercised are mainly of two classes; some going to the leg validity or to the regularity of the proceedings, and others to th justice or expediency of allowing the judgment to stand or th sentence or punishment to be enforced. Thus where the co was not legally constituted or composed, or was without juri diction of the offence or offender, or proceeded with the tri when below the minimum of members; or where the record di closes irregularities which, though not amounting to fatal defect are of a gross character;[1] or where the accused has been deni material testimony, or otherwise prejudiced in his defence;[2] the findings or a part of them are unwarranted by the testimony or the sentence itself is inadequate to the offence, or too seve or quite unmerited, or imposes a punishment not authorized b law,—in any such case the Reviewing Officer may, in his discr tion, withhold his approval from, and formally *disapprove*, th sentence, in whole or in part, as the law or facts may require o render proper. His discretion indeed is here without restriction its exercise does not depend upon the quality of his reason whether or not *any* reasons are stated by him, or whether h actual reasons are in point of fact good and sufficient or the re verse, the disapproval is equally effective in law.[3] At the sa time he will, of course, not properly disapprove without goo reason—without better reason than the court had for the acti which he fails to approve. Where, for example, the evidence i the case was conflicting, and it is apparent that the court, havin the witnesses before it, must have been the best judge of the relative credibility and of the weight of the testimony, it will i

court." XIII Opins. At. Gen., 460. That the fact of the disapprov does not divest the accused of the right to plead the acquittal or con viction in the event of a second arraignment for the same offence—se Chapter XVII—"Plea of Former Trial."

1. See DIGEST, 218; also *post*, under next head.
2. See recent instance in G. C. M. O. 43 of 1885.
3. DIGEST, 436.

l be wiser for the Reviewing Officer to defer to, rather than :ove, its conclusion.[1] Nor will he properly disapprove a ce on account of a mere error on the part of the court does not affect the merits or impair the final judgment— instance, an improper rejection of testimony offered by the e which however would have added to the case no material Nor will he ordinarily disapprove where he can have the remedied by a *revision* by the court, as presently to be :ed.

m of disapproval not affecting the sentence. The above considered is a disapproval in whole or in part of *tence.* The Reviewing Officer, however, it is to be added, nd in practice often does, exercise the authority of disap- as to some portion or portions of the proceedings not al to support the sentence; such disapproval not being a inate legal act like the other but an expression of disap- ion or difference of opinion on the part of the commander. ie may, in his review, disapprove a ruling of the court n objection to evidence, or a ruling upon some interlocu- atter as a motion for a continuance, which, though errone- es not impugn the final judgment; or he may disapprove tatement or omission in the record, which, not being at :e with a statutory requirement, does not constitute a fatal But this form of unfavorable comment is entirely con- with a final approval of the sentence or of a punishment.

wance of new trial, upon disapproval. As noticed ipter XVI, it was held by Atty. Gen. Wirt, in the early Captain Hall,[4] that a reviewing officer, in disapproving a ce, is authorized further, in his discretion, (for the allow-

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IGEST, 438, and Capt. Weisner's case, referred to in note; also 153, Dept. of Dakota, 1881; Opinion of Atty. Gen. Brewster in f. O. 19 of 1885. Similarly, upon an application for new trial in ninal practice,—"if there be conflicting evidence on both sides, question be one of doubt, it seems the verdict will generally be ed to stand." Wharton, C. P. & P. § 813; also Wright *v.* State, 110; Whitten *v.* State, 47 Id. 297.

e G. O. 70, Dept. of So. Ca., 1865. In such a case the reviewing y should in general simply express his disapprobation of the rul- ndicated under the next head.

e DIGEST, 218.

Opins. At. Gen., 233. (1818.)

ance is not a matter of right,) to order a new trial of the ac provided he specifically applies therefor, thus waiving his ilege under the provision against second trials for the offence now contained in Art. 102. But, beside the new granted under these circumstances in the case of Hall, the ilar instances in our service have been very few and rare.[1] only upon, and as an incident to, a disapproval of a sentenc the new trial can be allowed; after approval there can legal no such proceeding.[2]

Action where the accused is insane or imbecile. should be noticed the action to be taken in cases in whic accused is found by the court, or deemed by the reviewin thority himself, to have been at the time of the offence o trial, or to be at the time of the review, mentally derang otherwise irresponsible. Where the accused was apparentl sane, &c., at the commission of the offence, and the court, withstanding, have sentenced him, the reviewing officer properly *disapprove* the sentence; and in such a case, or in where the court has not proceeded to sentence, but the fac insanity, &c., appears from the evidence, or the finding, recommendation of the members, he will in general properly charge the accused, (under the 4th Article of war,) or recomm his discharge by superior authority, and take measures for commitment, if the case warrants it, to the Government Asyl for the Insane. Where the insanity, &c., has developed si the commission of the offence, the reviewing officer will general properly *approve and remit* the sentence, (if any,) wi similar action as to discharge, &c.; first, if desirable, assuri himself as to the question of sanity by causing the accused to examined by a medical officer or board.[3]

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1. See instances in G. O. 18 of 1861; Do. 8, 9, 26, First Mil. Di 1869. "The privilege has naturally been but seldom exercised; part convicted and sentenced being in general satisfied that the proceedin in their cases should be terminated by the disapproval, on whatev grounds the same may be based." DIGEST, 345.

2. DIGEST, 345.

3. See, as illustrating the text, cases in the following Orders:—G. 54, Dept. of the Pacific, 1864; Do. 13, Northern Dept., 1864; Do. Dept. of the Susquehanna, 1864; Do. 81, Middle Dept., 1865; Do. Dept. of Ark., 1866; Do. 22, Dept. of Cal., 1866; Do. 40, Dept. of V 1866; Do. 62, 73, First Mil. Dist., 1867; Do. 1, Div. of the Pacific, 18 G. C. M. O. 39, Dept. of the Mo., 1868.

RETURN OF THE PROCEEDINGS FOR CORRECTION.

ature of the Authority. Incident to the discretion, vested he code in the Reviewing Officer, (whether military com- ıder or President,) to approve or otherwise act upon the pro- lings and sentence, is the authority, fully recognized at mil- y law,[1] to cause any error or errors appearing in the record, capable of correction, to be corrected by the court before final on taken by him on the case.[2] Where, in reviewing the rec- as transmitted to him, he believes that he has discovered a erial omission or other defect, either in the findings or sen- ce or some interlocutory proceeding of the court, which may perly call for a *disapproval*, he may, instead of formally disap- ving, return the record to the court for the purpose of having requisite amendment made, with a view, if it be duly made, ı final *approval*. To this alternative indeed a reviewing officer l in general naturally and properly resort, provided the court ınot yet been dissolved—as of course, (except in an emergency,) hould not be before a case tried by it has been finally acted on. He may also be called upon to take this course by a su- ior commander or the President, who, upon the proceedings ng transmitted to him for final action, has discovered some erial error therein. It is evidently only by the return of the ord to the court that the correction can legally be procured to nade, since the reviewing officer cannot make it himself inde- lently of the court,[3] nor can the court, after it has once duly pleted and forwarded to him the record, recall it for modifi- on.[4]

Kennedy, 214; McNaghten, 146; O'Brien, 277; De Hart, 203; EST, 440; Army Regs., par. 923. It is equally recognized in the Y. IV Opins. At. Gen., 19; VI Id., 204; *Ex parte* Reed, 100 U. 2. Compare the analogous authority of the criminal judge to call ı a jury to correct a defective verdict. Wharton, C. P. & P. § 751; shop, C. P. § 1004; Regina *v.* Meany, 9 Cox, 233.

The action taken by the court is usually designated in practice ıe term "Revision."

DIGEST, 437; Clode, M. L., 167.

The situation is of course to be distinguished from that of a court h has not yet transmitted its proceedings to the reviewing officer is action, and which, until it does so, may reconsider and reform its ıgs and sentence at discretion.

Occasions and Grounds for its Exercise. These, (s larly to those which may warrant a disapproval of the pro ings,) may consist of: 1. *Clerical omissions or mistakes* in terial formal particulars in the making up of the record; as—an omission to prefix or append a copy of the order co ing the court or of an order modifying the detail, &c., or to s the numbers present at any session, or to state the fact of th ministration of the oath or of the according of the right of lenge, or to include a portion of the charges or specificatio to enter the pleas made thereto or any special plea, or to that the witnesses were sworn, or fully to record the evid finding, or sentence, or to attach an exhibit; or a mis-state of the name of the accused in the sentence or a specificatio making a material variance. And with these is to be class omission by the presiding officer or judge advocate to certif sentence or authenticate the record: 2. *Errors of law or fa of judgment or discretion*, on the part of the court, in its ru or conclusions. Such are, mainly, errors in the substance o findings or sentence—as that the findings, or some of them not warranted by the evidence, or are based upon the imp admission or rejection of evidence;[1] or that the sentence is warranted by or consistent with the findings, or is not itsel gally authorized for the offence or offences found; or that sentence is inadequate, or unduly severe, or inappropriate or expedient under the circumstances of the particular case.

Whether the defect be occasioned by inadvertence, or a from a misconception of law or military usage, or from an imp fect logic or a misuse of the judicial faculty, it is of course m desirable that it be removed, if practicable, from the proce ings, and the due and rational course of justice be relieved fr obstruction and embarrassment. This is particularly to be d sired where there has been a *conviction*, since, in the absence the correction, the sentence may not legally be capable of exec tion or for other reason may properly have to be disapprove But in a case of *acquittal* also it is no more than just that an er

1. DIGEST, 244. A modification by the court of a finding may quire a modification in the sentence. Griffiths, 90. The court, on revision, may so far change the finding as to substitute a conviction an acquittal, adding thereupon a sentence. Griffiths, 92; G. O. 6, De of Va. & No. Ca., 1864; Do. 13, Dept. of Va., 1866. And see par. Army Regs.

substance should be caused to be corrected, in order :cord may go on file so perfected that the accused will ıstained by it in the event of a subsequent plea of *au-ıit.*

which Cannot be Corrected. Radical fatal defects, ı illegality in the constitution or composition of the . want of jurisdiction of the offence or offender, are of :mediable by this procedure. So, defects or errors can-e corrected which from their nature can be remedied or only at the stage of the proceedings at which they oc-.east at some time pending the trial—as errors in the specifications, or misrulings of the court upon special ›jections to testimony. Further, the object of the re-ıg to make the proceedings conform to the *fact*, the ıuestion does not extend to the correction of errors of ble of being corrected if the facts warrant, *when the ›t warrant the correction.* Thus if the members or judge ›ere not *in fact* sworn, the court, on being reassembled, supply an omission of the usual statement in regard to istering of the oath, by a statement to the effect that ers, &c., *were* duly sworn; nor could it cure the defect ›on causing itself, or the judge advocate, to be sworn *unc.* So, if only four members were present on a cer-f the trial, the court could not, on reassembling, de-a quorum was really then present, nor could it make eplace the proceedings of that day by repeating them nd with an actual quorum.

tion by Means of New Testimony not Allowable. he record be returned on account of an error which rected only by means of the introduction of testimony. : of the proceeding is not to reopen an investigation been closed or rehear a case once tried and brought to but simply to revise what has been judicially com-'o permit the introduction of additional testimony upon ; would amount substantially to a new trial.[1] More-testimony would have to be received subject to the :tions and to cross-examination, and to the further in-of other testimony to meet it, on the part of the de-

›ins. At. Gen., 204–5.

fence; and the investigation would thus not only be n
but indefinitely prolonged. And although the eviden
ted were simply that of previous witnesses recalled to
their former statements, there would still practically be
ing, and the proceedings would be liable to be protract
same manner as where the witnesses were new, only in a
gree. *Interest reipublicae ut sit finis litium*, and most o
part of the republic embraced in the military state, where
and final action is of the very essence of government a
pline. That no evidence whatever shall be presented
at this stage is indeed a principle established by the grea
of authority,[1] and this principle, upon a recent reconsider
the subject, has been emphatically reaffirmed in General

Course of Proceeding. The record is returned to th
(generally through the judge advocate, from whom, acco
par. 918, Army Regulations, it was received,) with an
official communication requiring it to reassemble in the
reconsider the proceedings, or the findings or sentence,
view of making a certain indicated correction, (or corr
therein. Where the alleged error is merely clerical or f
is commonly sufficient merely to specify it. In an insta
supposed error of law or opinion in the verdict or award
ishment, a brief statement of the reasons deemed to call
amendment is usually added, or indicated as contained i
companying indorsement or report.[3]

Upon the receipt of the order, the judge advocate, (o
dent,) notifies the several members, who proceed to reas
at the original place of meeting, or at a new one if the o
it may, shall name such. The same rule prevails at such
ing as at all the sessions of a general court-martial, that five
bers are both necessary and sufficient for the transaction o

1. McNaghten, 146; Simmons § 724, note 3; Clode, M. L., 16
comb, 69; O'Brien, 280; De Hart, 204; G. C. M. O. 16, Dept.
Platte, 1875. And see VI Opins. At. Gen., 201. The present
law is to the same effect. Army Act § 54, (2;) Rules of Proc
§ 51, (A.)

2. G. O. 47 of 1879, publishing an opinion of Judge Advocat
eral Dunn. And see DIGEST, 441; also G. C. M. O. 130, Dept.
kota, 1885.

3. See DIGEST, 440.

[1] If meanwhile, by absence or any casualty of the service, nembers who sat on the trial have been reduced below five, order cannot take effect. But if five at least can assemble, immaterial that their number be considerably less than the nal number of the court in the case,[2] *provided*—for this is itial—such five all took part in the trial and judgment.[3] If court has been *increased* in the number of its members, it can-as increased, (*i. e.* composed in part of the new and additional ibers,) be convened to revise proceedings taken by it before increase.[4]

ily the judge advocate and members are present, the pro-ing being analogous to that which takes place upon a delib-on when the court is cleared.[5] Of course, if evidence were n, the accused would properly be present, (with his counsel ly,) and the session would be open to the public; but, as idy stated, the occasion is not one at which testimony can be iduced. If indeed the correction be one which cannot accu-y or fairly be made without the concurrence of the accused, here it concerns the form of some peculiar special plea, mo-objection, &c., interposed by him, it will be regular and er to admit him to the revision.[6] Such cases, however, are rarely presented, since the reading, on each day of the trial, ie previous day's proceedings will in general enable the ac-d to have every particular relating to his defence fully and isely set forth.

quorum having convened, the order, and accompanying rs if any, are read by the judge advocate, and the court, after deliberation and voting as may be necessary, proceeds, if urring with the Reviewing Officer, to rectify the error by ing the proper minute on the subject. If it determine that

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DIGEST, 440; VII Opins. At. Gen., 338; G. C. M. O. 54, Dept. exas, 1873. In the case of a regimental or garrison court, it would ecessary of course that all the three members should reassemble.

DIGEST, 441.

DIGEST, 440; G. O. 45, Dept. of the East, 1865. In a case in G. 3, Northern Dept., 1865, the proceedings were disapproved because officer of the original detail who did not sit on the trial took part in evision.

G. O. 64 of 1827. (Ruling of President J. Q. Adams.)

See Clode, M. L., 167.

DIGEST, 441.

no error has been committed, it will return the record with an official communication, declining, for reasons stated,[1] to make the correction.[2] In such event the Reviewing Officer cannot of course order or compel the court to take the action proposed,[3] but he may return to it the record for a *reconsideration* of its conclusion, at the same time responding to or commenting upon the reasons of the court as he may deem expedient. The court may then decide to adopt his view and make, finally, the correction, or it may again return the proceedings with an official statement to the effect that it adheres to its former determination, adding such argument or observations as it may see fit. There is in our military practice no limit to the number of times that the record may thus be returned,[4] but it is not often that the same is in fact returned a second time after the court once decide not to make the amendment. Upon such conclusion the Reviewing Officer, (unless convinced that the court is in the right in the matter,) will commonly dispose of the case with an expression of disapproval of its action on the revision, as also, in general, of the sentence, finding, or other proceeding in respect to which the desired correction has been declined to be made. If, however, the error does not affect the validity of the sentence, he may, while disapproving the conclusion of the court, approve the sentence rather than that the offender go unpunished.[5]

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1. The court is not obliged to give reasons for adhering to the proceedings as they stand, but it will in general be no more than properly deferential for it to do so.

2. Instances of the court declining to amend may be noted in the following Orders: G. O. 48, Dept. of Va. & No. Ca., 1864; Do. 21, Dept. of the Ohio, 1866; Do. 48, Dept. of Dakota, 1868; Do. 5, Dept. of the Lakes, 1869; G. C. M. O. 159, Dept. of the Mo., 1871; Do. 55, Dept. of Cal., 1875. Proceedings had on revision, however, are rarely inserted in Orders of promulgation.

3. DIGEST, 440; Pipon & Col., 63.

4. G. O. 2 of 1844; O'Brien, 279; DIGEST, 440. So a criminal judge may "send back" a jury "any number of times to reconsider their finding." Regina *v.* Meany, 9 Cox, 233. In the British military law the proceedings may be returned to the court for correction but once. Army Act § 54, (2.)

It may be noted that where the court has made or attempted to make the correction, the proceedings may again be returned for the correction of errors in the form or substance of the revision itself, or for the purpose of having it completed or elucidated. See the marked instance Gen. Swaim's Case, as fully set forth in G. C. M. O. 19 of 1885.

5. See case in G. C. M. O. 16, Dept. of the Platte, 1875; also G. C. M. O. 19 of 1885.

of recording the revision. The proceedings of the
›n the revision are to be recorded with the same for-
those had at any other session.[1] The record of the re-
l properly consist of a continuation of, or rather supple-
:he previous record in the form of an addition at the
ɛ original proceedings.[2] It will regularly comprise the
ng order and accompanying papers, or copies of the
atement of the fact of the reassembling at the time and
cified, with a designation of the quorum of members
nd a brief account of the action taken in considering
r of the alleged error, making the correction, &c. In
›rth the details of a correction, proper reference will be
ıe part of the original record in which the error appears.
rd of the revision will be authenticated by the signa-
he president and judge advocate: if an amended sen-
djudged it will be similarly certified.
ticularly to be noted that the action had and correction
the court, (except where consisting merely in the affix-
omitted signature of the president or judge advocate,)
y appear—be stated and made—*only* in and by the sup-
y record of the revision; that it cannot, by interlinea-
›tation, or otherwise, be inserted in, or attached or added
iginal proceedings. *These* must remain intact as re-
o word or statement thereof, however erroneous or objec-
ber se, can be erased, expunged, or modified; nor can a
ı and corrected page or extract be substituted for a defect-
›n in the body of the record.[3]

:ST, 419. And see G. C. M. O. 29, Dept. of the Mo., 1874.
ths, 90; Glode, M. L., 167; O'Brien, 280; G. O. 42, Dept. of
1863; DIGEST, 419.
ıons § 726; Kennedy, 215; Griffiths, 90; Clode, M. L., 167;
59; O'Brien, 280; De Hart, 205; DIGEST, 419, 440; Capt.
Trial, p. 47; G. O. 42, Dept. of the Tenn., 1863; Do. 26,
Dept., 1865; Do. 54, Dept. of Dakota, 1867; Do. 42, Id.,
3, Dept. of the South, 1870. In a recent case in G. C. M.
ept. of Cal., 1882, Gen. Schofield disapproves the action of
in "the revision of the *plea*, which was incorrectly made by
he omitted words in the body of the *original record*, instead
them in the record of the revision with the proper refer-
ɛ original proceedings." (Citing DIGEST, 419, 441.) "The
y, however, is not regarded as affecting the legality of the
gs."

The correction must be the act of the court. The proposed amendment can only be made by the court as convened for the purpose, and must be the act of the court *as such*. That the error is a merely clerical one does not authorize its being amended by the judge advocate alone, and *any* correction assumed to be made either by that official, or by the president or other member apart from the court and without its authority, by means of an erasure, interlineation, addition to the record or otherwise, must be wholly unauthorized and ineffectual in law.[1] Nor can either the president or the judge advocate, at this stage, properly add his signature, (previously omitted,) to the original proceedings without the concurrence of the court. In a word, each and every amendment, whether of form or substance, must be made by the court, or by its direction, and as a part of its formal proceedings had under the order reassembling it.

III. ACTION OF THE PRESIDENT AS CONFIRMING AUTHORITY.

Provisions of the Articles of War. The law on the subject of the *confirmation* of military sentences by the President which has been compared to "the judgment of a court of last resort,"[2] is contained in Arts. 105, 106 and 108, as follows:—

"ART. 105. *No sentence of a court-martial, inflicting the punishment of death, shall be carried into execution until it shall have been confirmed by the President; except in the cases of persons convicted, in time of war, as spies, mutineers, deserters, or murderers*

1. DIGEST, 441; G. O. 3, Dept. of the South, 1870.

Compare, in connection with the present Title, the following Orders in which are published proceedings had upon Revision, in a variety of cases:—G. O. 61, 75, 76, 90, Army of the Potomac, 1862; Do. 23, Dept. of Va. & No. Ca., 1863; Do. 6, 48, 53, 60, Id., 1864; Do. 13, Dept. of Va., 1866; Do. 21, Dept. of the Ohio, 1866; Do. 48, Dept. of Dakota, 1868; Do. 5, Dept. of the Lakes, 1869; Do. 57, First Mil. Dist., 1869; Do. 22, Id., 1869; G. C. M. O. 159, Dept. of the Mo., 1871; Do. 5, Dept. of Cal., 1875. Such proceedings are now rarely specifically promulgated. In general, where a revision has been had and a correction made in the findings or sentence, or otherwise, only the proceedings *finally settled* are published.

2. "Like the judgment of a court of the last resort, final and conclusive." Wooley *v.* U. S., 20 Law Rep., 631. But the *approval by a military commander* of a sentence which does not require the action of the President, (or other superior authority,) is equally final and conclusive. See *ante*—"Approval."

the cases of guerilla-marauders, convicted, in time of war, bery, burglary, arson, rape, assault with intent to commit r of violation of the laws and customs of war; and in such d cases the sentence of death may be carried into execution nfirmation by the commanding general in the field, or the nder of the department, as the case may be.

T. 106. *In time of peace no sentence of a court-martial, di- the dismissal of an officer, shall be carried into execution, t shall have been confirmed by the President.*

T. 108. *No sentence of a court-martial, either in time of or in time of war, respecting a general officer, shall be car- to execution, until it shall have been confirmed by the Pres-*

105—Action upon Death Sentences. This Article s of a provision of Art. 65 of the code of 1806, consolidated d modified by provisions of the Act of July 17, 1862, c. 201, e Act of March 3, 1863, c. 75, s. 21, and the Act of July 2, . 215, s. 1. The Article of 1806 had required the approval President in cases of death sentences, only in time of war. t of 1862 made this approval a requisite to the execution leath sentences. The Act of 1863 engrafted an exception is general rule by authorizing the execution of such sen- "upon the approval of the commanding general in the in cases of "any person convicted as a spy or deserter, or ny or murder." The Act of 1864 extended this authority owering "the commanding general in the field, or the com- r of the department as the case may be," to carry into ion all sentences imposed by *military commissions* upon *lla-marauders* for robbery, arson, burglary, rape, assault ntent to commit rape, and for violations of the laws and s of war." It may be observed that Art. 105, whether by rtence or otherwise, has included this class of war-criminals ect to trial by *court-martial:* they are properly triable only itary commission,—the tribunal employed for their trial the late war,—as the Act of 1864 recognizes.

e exceptions related to *time of war*, and are therefore so uished in the present Article. The effect of the Article —that, in time of peace, and in time of war except in the lar cases specified, (when the military commanders indi- nay finally act upon and enforce the sentence,) a confirma-

tion by the President is essential to authorize the ex- ecuti the death penalty.

In Chapter XXV will be considered in what consists the cri of the spy, and the crimes of desertion, mutiny and murde What is the further offence of "violation of the laws and custo of war," and what is the class termed in the statute "guerill marauders," or, as they have commonly been designated, "gu illas," will be set forth in PART II relating to the Law of War.

The established principle that a sentence of death, (or any oth sentence,) requiring the confirmation of the President, must r ceive the approval of the proper military commander—the ori inal Reviewing Officer—before it is forwarded or presented f the action of the President, or confirmed by him, has alre been stated. Of course if such sentence is *disapproved* by s commander, nothing remains for the President to act upon, a the proceedings are not forwarded.

The further principle that, in the absence of any legal requi ment as to the *form* of the confirmation, the same may be a thenticated and declared by the Secretary of War, as the rep sentative of the President, will be more particularly noticed un the next head.

Art. 106—Action upon Sentences of Dismissal. Th Article is but a transcript of a provision to the same effect co tained in Art. 65 of the code of 1806. In providing that, in tim of *peace*, sentences of dismissal, in order to have effect, shall b confirmed by the President, it impliedly authorizes their being e ecuted upon the approval of the proper military commander alon in time of *war*—an authority further conferred by Art. 109.

Form of confirmation—Authentication by the Secre tary of War. The only material question which has been rais under this Article is whether the confirmation must appear to b the personal manual act of the President—as by his signatu being affixed thereto; or whether the same may not be authen cated by the signature of the Secretary of War.

No form for the confirmation is prescribed by the Article, an in the absence of any requirement on the subject, the questi indicated becomes a most simple one. It is determined by reference to one of the fundamental principles of the executi administration of the government, viz:—that the signing a

, by the head of the appropriate executive department, of
:r, direction, decision, or other formulated act in writing,
:d to be given or performed by the President, is a proper
gal authentication of the will of the President in the case;
he declaration on the subject of the head of department
be presumed to be made with the knowledge and by the
ion of the President; and that the act of the former is, in
nplation of law, the act of the latter. This legal presump-
cted upon as it has been in all the administrative depart-
from the earliest period, and without which the executive
ss of the government could not be carried on, has been
iced and illustrated in repeated decisions and rulings.[1]
t this principle was applicable to the action of the Presi-
pon sentences of dismissal of officers, adjudged by court-
l, was held by Judge Advocate General Holt, in 1867, in
Haddock's case, and by him and his successor in sundry
ient cases, including the case, presently to be noticed, of
Runkle. The ruling was to the effect that a sentence of
al of which the approval or confirmation was attested by
nature of the Secretary of War, (as such action not unfre-
was attested during the war, as well as prior thereto and
iently,) was to be presumed to have been duly approved
rmed by the President.[2]
'77, however, in the case of Major Runkle, (retired,) the
ation of whose dismissal, adjudged in 1873,[3] was signed
Secretary of War, it was determined by President Hayes
ch form of action was insufficient in law, that the dismis-
thus never been legally confirmed, and that Runkle was
the army: he therefore restored him to the service[4] with
some four and a half years—the period intervening since
ion taken upon his dismissal. This extraordinary ruling,
:r, did not become a precedent; it was condemned by the

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ilcox *v.* Jackson, 13 Peters, 498; U. S. *v.* Eliason, 16 Peters,
'illiams *v.* U. S., 17 Peters, 144; I Opins. At. Gen., 380; II Id.,
Id., 453, 482, 725–6; IX Id., 463; XIII Id., 5; XIV Id., 453;
290; Opin. Id., of Feb. 16, 1881, (Lieut. Newton's Case;) Di-
i; G. O. 35 of 1850; Do. 110 of 1874.

GEST, 91.

C. M. O. 7 of 1873.

O. 20 of 1878.

Judiciary Committee of the Senate;[1] opinions directly counter to it were rendered by the Attorney General[2] and Judge Advocate General; and the claims of sundry other dismissed officers, whose cases, in respect to the form of the approval of the sentence, were identical with Runkle's case, and who forthwith applied to President to be restored to the army on this ground, were, in of them, favorably considered. Finally it was expressly determined by the Court of Claims that the action of the President was unauthorized, that Runkle was legally dismissed and illegally restored, and a judgment for over nine thousand dollars for pay unlawfully received by him as an officer of the army, was rendered against him.[3] The exceptional action in this case, therefore, has been effectually repudiated; it has had, however, this result in practice, that approvals or confirmations of sentences of dismissal requiring the action of the President have since been and are now, authenticated by his own sign manual attached thereto.

Art. 108—Sentences respecting General Officers. This Article, repeated from a provision of Art. 65 of 1806, does not call for extended remark. It may merely be observed that a sentence "*respecting a general officer*" is a sentence imposing any punishment whatever, whether light or severe, upon an officer of that rank.

IV. ACTION OF COMMANDING GENERAL AS CONFIRMING AUTHORITY.

The statutes authorizing and defining this action are Articles 105 and 107.

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1. Senate Report 868, 45th Cong., 3d Sess., March 3, 1879. [Two of the Committee of seven dissented.]

2. XV Opins. 290; Opins., in cases of Paymaster Post, U. S. N., and Lieut. Armstrong, U. S. A., of Feb. 24, 1881, and June 28, 1882. In the first cited of these opinions, (the one given in Runkle's case,) it is remarked that the Secretary, in signing the action, need not expressly declare it to be '*by the direction of the President*,' since the presumption always is that it is so; further that par. 918, Army Regs., does not apply to the action of the President upon proceedings of courts-martial.

3. Runkle *v.* U. S., 19 Ct. Cl. 396. And see reference to this case in Chapter XXV—"Ninety-Ninth Article."

105. The cases in which, under this Article, sentences h may be confirmed and executed by "*the commanding* ' *in the field, or the commander of the department,*" have · been indicated under the Title of the Action of the Presi- ; Confirming authority.

. **107.** This Article prescribes as follows:—"*No sentence urt-martial appointed by the commander of a division or of a te brigade of troops, directing the dismissal of an officer, shall ried into execution until it shall have been confirmed by the al commanding the army in the field to which the division or de belongs.*"

is Article is a provision of the Act of Dec. 24, 1861, of which ain portion is contained in Article 73, considered in Chap- I, where are defined the terms "division" and "separate de." Like Art. 73, the present Article is operative only in of *war.*

eed only be observed that, as in cases of sentences required confirmed by the President, the sentences indicated in this e, preparatory to being confirmed by the army commander, be duly *approved* by the officer who convened the court or ccessor in the command.

V. EXECUTION OF SENTENCES.

Law on the Subject. The general law authorizing the tion of sentences, (and which may be regarded as including ces imposed by regimental and garrison as well as general ,) is contained in Art. 109, as follows:—"*All sentences of a martial may be confirmed and carried into execution by the ordering the court, or by the officer commanding for the time where confirmation by the President, or by the commanding al in the field, or commander of the department, is not re- l by these Articles.*"

ect of the Article. The effect of this Article is, that the ce may be executed or caused to be executed by the officer rdered the court and has approved the sentence, (or his suc- in command,) in all cases except those in which the Presi- by Art. 105, 106, or 108, or a superior commander, by Art. 107, is required finally to confirm the sentence; and that, excepted cases, the order for the execution shall proceed

from the President or such superior. In all but the excepted cases, the approval of the original reviewing officer remains a complete and sufficient warrant and order for the execution; and his action thereon is final and conclusive, and to forward the record for the action of the President, &c., must be not only superfluous but unauthorized.[1]

Discretion of "the Officer ordering the Court," &c. The discretion of this officer is absolute under the Article in all cases not belonging to the excepted classes. Whether he shall confirm and execute the sentence rests entirely with him, and is for him alone to determine. Here no superior can direct or instruct him. Where the case involves a question of law or fact upon which, in a similar instance, an opinion has been expressed by an official superior, he will, as remarked in referring to the exercise of the power of approval under Art. 104, properly take such opinion into due consideration; but he is not required to concur therein, nor should he do so if the same does not accord with his own views of law and justice. To the exclusive authority here conferred upon him is attached an obligation to exercise such authority in conformity with law, and for the best interests of the service as he understands them.

The terms used in the Article. The technical or descriptive terms employed in Art. 109, such as "confirmed," "the officer ordering the court," "the officer commanding for the time being," have been construed in considering the subject of Approval and the provisions of Art. 104.

Execution of Specific Punishments. The execution of the different specific punishments imposable by sentence—as death, dismissal, imprisonment, forfeiture, reduction, discharge, &c., has already been fully considered in Chapter XX.

General principle governing Execution—Punishments not to be added to. When a legal military sentence has been duly passed upon and approved by the competent authority, "it

1. Where the sentence "may be lawfully carried into execution the confirmation of the officer ordering the court, neither the President nor Secretary has lawful authority to approve or disapprove" the same. XI Opins. At. Gen., 251. And see G. O. 341 of 1863.

mes," in the language of the U. S. Supreme Court,[1] "final must be executed;" that is to say unless the power of par- or mitigation, conferred by Art. 112, be interposed. That adjudged punishment may not be *added to*, by or through action or order of the reviewing officer, is a fundamental :iple of the law of the execution of sentences.[2] Thus a :nce of simple dismissal, suspension, or discharge may not ade to work a forfeiture of pay,[3] nor may a sentence of sim- nprisonment be made to involve compulsory hard labor or ıry confinement.[4] This principle has also been illustrated :ating of the different punishments in Chapter XX. The marked instance in our military history of a violation of rinciple was the action of General Jackson, when command- n Florida in 1818, in the case of Robert C. Ambrister, tried general court-martial for inciting and aiding the Creeks in cuting war against the United States. The court first sen- d the accused to be shot; then, having reconsidered, as it l legally and regularly do, its judgment, substituted therefor nilder punishment—which thereupon became the legal and sentence—"to receive fifty stripes on the bare back and be ned with a ball and chain to hard labor for twelve calendar ths." In acting upon the case as reviewing officer, Gen. son disapproved of the reconsideration, approved—as he could legally do, since it did not exist—the first sentence, and or- d that the accused "be shot to death agreeably to the sen- e of the court;" and he was shot accordingly.[5] This order only contained a false statement of fact, but—not being an of war or resorted to in the exercise of martial law, but official on taken upon the proceedings of a court-martial under the cles of war—was wholly arbitrary and illegal. For such an r and its execution a military commander would *now* be held ctable for murder.

Dynes *v.* Hoover, 20 Howard, 81.

Harcourt, 133, 146; Maltby, 101; XI Opins. At. Gen., 139; Di- , 66, 286, 287, 428, 437, 451, 469.

DIGEST, 270.

DIGEST, 286.

The record of this trial, with that of A. Arbuthnot tried by the same , is contained in full in American State Papers, Military Affairs, vol. 721–734. And see Printed Trials of Arbuthnot and Ambrister, Lon- 1819.

Conclusive effect of an Executed Sentence. It is: general principle that a sentence once duly approved or co and carried into execution, is beyond the reach, *i. e.* nc subject to the action, of the Reviewing Officer, in the of his authority under the Articles of war. In the first sentence thus duly executed is wholly beyond the contro *revisory function*—is no longer subject to review by th mander who has approved or the President who has confir Of course a thing *done*—as an imprisonment undergo example—cannot, physically, be *undone.*[1] But where, the punishment itself cannot be undone, its effect may be a case of a sentence of dismissal of an officer or of the fo of the pay of a soldier—here also the sentence cannot be or reopened, nor can the executed penalty be reversed, res or modified.[2] Further, such a sentence is beyond the the *pardoning power:* neither can the commander, un authority conferred by Art. 112, "pardon or mitigate" ecuted punishment, nor can the President remit it by a of the offender under the Constitution.[3] Thus, as to a s of court-martial when duly and fully executed, the Rev Officer is *functus officio*, his authority is exhausted; some quite outside of the powers of revision and pardon must sorted to for the rehabilitation or relief of the party. An for example, duly dismissed the service by sentence of martial cannot be restored to the army by an attempted re of the confirmation or setting aside of the sentence, or by don or remission, but can be so restored only by a new ap ment made by the President and confirmed by the Senate. soldier reduced to the ranks by a duly-approved sentence restored to the grade of a non-commissioned officer onl new appointment as such on the part of the competent m authority. On the other hand, an officer or soldier wh been condemned by an executed sentence to forfeit or pay United States a sum of money, can be relieved from or

1. See Hoffman *v.* Coster, 2 Whart. 468.

2. IV Opins. At. Gen., 170, 274; VI Id., 369, 514; X Id., 6 Id., 291, 433; Opin. Id., of March 15, 1882, (Gen. F. J. Porter's DIGEST, 237, 389–90, 439, 453.

3. *Ex parte* Garland, 4 Wallace, 381; XII Opins. At. Gen., 5 GEST, 237, 390, 439, 453. As to the remission of *continuing* ments, see *post.*

ed for such payment, only by an act of legislation in his alf on the part of Congress.

VI. SUSPENSION OF EXECUTION OF SENTENCES.

rt. 111. The provision of law on this subject is contained his Article, as follows:—"*Any officer who has authority to carry execution the sentence of death, or of dismissal of an officer, suspend the same until the pleasure of the President shall be wn; and, in such case, he shall immediately transmit to the sident a copy of the order of suspension, together with a copy e proceedings of the court.*"

ffect and Object of the Article. This Article, derived a provision to a similar effect of Art. 89 of 1806, extends to ers, when authorized, (under Art. 105, 106, or 107,) to execute ences of death or dismissal, the privilege of suspending the cution of the same till they shall have been submitted to and lly acted upon by the President; in other words the privilege levolving upon the President the responsibility of the action e taken upon such sentences.

he principal object, however, of the Article, which is opera- only *in time of war*, would appear to be, not to relieve com- nding officers of their due responsibility in proper cases,[1] but afford an opportunity for the remission or mitigation of a sen- ce of death or dismissal when, in the opinion of the com- nder, it should properly be remitted or mitigated.[2] The power pardon or mitigation in cases of such sentences cannot, even time of war, legally be exercised by a military reviewing offi- , but, by Art. 112, is expressly reserved to the President.[3] By suspending, therefore, of the execution of the sentence as licated in the Article, an opportunity is afforded for the ex- ise of executive clemency, if the President think proper to tend it.

Approval a prerequisite to Suspension. As has already n remarked, the exercise of the function specified in this Ar- le must have been preceded by a formal *approval* of the sen-

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. See G. O. 139, A. & I. G. O., Richmond, 1863.

. Note context of Art. 89 of 1806.

. See G. O. 97, 101, 147, of 1863; VI Opins. At. Gen., 124–5.

tence by the officer; in other words, the execution of a sentence which has not been duly approved, or which has been disapproved, by the convening authority, (or his successor in command,) cannot legally be *suspended*, nor can the sentence be acted upon by the President under the Article.[1]

Transmission of the Order and Proceedings. The "order of suspension" is merely the official statement, appended to the record after the sentence, and signed by the reviewing authority, to the effect that the sentence is approved but its execution suspended, and that the proceedings are transmitted to the President for his action under the 111th Article of war. The transmittal of *copies* only is called for by the Article: in practice, however, the original proceedings, with the original action of the reviewing officer, are always forwarded.

"The Pleasure of the President." This term is a broad one, and the Article has been construed in practice as not limiting the President to a remission or mitigation of the punishment or punishments, but as empowering him to approve or disapprove the suspended sentence, (or to approve in part and disapprove as to other part,) in the same manner and with the same effect as if it had been a sentence to the execution of which his confirmation was made requisite by Art. 105 or 106.[2]

VII. PARDON AND MITIGATION OF PUNISHMENTS.

Art. 112. This provision, derived from Art. 89 of the code of 1806, and which completes the grant of powers to the officers authorized to act upon the sentences of courts-martial, is expressed as follows:—"*Every officer who is authorized to order a general court-martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of death or of dismissal of an officer.*"

Nature of the Authority Conferred. This Article confers upon the commanders specified two distinct powers—a power to "pardon" and a power to "mitigate." As to the former, this though of a quality similar to that of the pardoning function

1. G. O. 209 of 1863; DIGEST, 92.
2. DIGEST, 92.

ted in the President by the Constitution, is different from and erior to the same in effect and scope. *That* is a *plenary* power pardon the *offence* and the *offender*, by the exercise of which : stigma of the conviction is done away with, the penalties and abilities incident thereto or to the sentence are removed, and : offender is personally completely rehabilitated in law.[1] But : power given by the Article is a power only to "pardon" a punishment," that is to say a power of *remission;* and if the rd *remit*—the term properly describing the pardoning of a punment—were substituted for the word *pardon* in the Article, its raseology would be less antiquated[2] and more precise. The ercise of this limited power simply relieves the accused in ole or in part from the *punishment;* the guilt of the offender found, and the penal liabilities consequent thereupon, remain- unaffected in law.[3] Thus a mere remission of the punish- nt adjudged a deserter will not relieve him from the civil dis- alification attached by statute[4] to his conviction; nor, in a case ntemplated by Art. 100, will such a remission relieve an officer m the consequence, incident upon his conviction and sentence, not being associated with by other officers: in either case a rdon of the offender will be necessary to restore the forfeited ht.[5] But remission, as above indicated, is of the quality of par-

1. "The pardon makes him, as it were, a new man, and gives him a w capacity and credit." 2 Hawkins, c. 37, s. 48. And see *Ex parte* rland, 4 Wallace, 380; People *v.* Pease, 3 Johns. Cas. 334; IX Opins. Gen., 478; XII Id., 124; DIGEST, 356, 426. A pardon by the Presi- nt will in general restore all rights of property lost by the conviction. sborn *v.* U. S., 91 U. S. 474. It will not, *per se*, operate to remove a nalty or disability attached by a *State* statute. VII Opins. At. Gen., o. It does not extend to forfeitures *by operation of law*, since these e not punishments. (1 Bishop, C. L. § 709.) That the pardoning wer of the President cannot be restricted by Congress, see—*Ex parte* arland, 4 Wallace, 334; U. S. *v.* Klein, 13 Id., 141, 148; V Opins. t. Gen., 582; VI Id., 402; VIII Id., 282; Cooley, Const. Lims., 140.

2. The term has been derived without change from the early codes of 75 and 1776.

3. DIGEST, 426.

4. DIGEST, 225, 356. As to the distinction between remission and rdon, compare Perkins *v.* Stevens, 24 Pick. 277; Lee *v.* Murphy, 22 at. 799; 1 Bishop, C. L. § 763; II Opins. At. Gen., 329; V Id., 588; III Id., 283-4.

5. As those imposed upon deserters by Secs. 1996, 1998, Rev. Sts. forfeitures by operation of law remain unaffected—as those attaching the operation of Sec. 1265, Rev. Sts., and pars. 220 and 2458, Army gs.

don—is indeed pardon of an inferior degree, the power to p
including the power to remit.[1] The attributes therefore
constitutional pardoning power of the President will be fo
characterize in a measure the power of remission possessed
viewing officers, who indeed, in the exercise of this powe
be regarded as the agents or representatives of the Execu
military cases.

As to the power to "*mitigate*," this is quite a distinct a
ity. Unlike the power to remit, it is not a form of pard
power but is a power attached as an *incident* to the power to
courts and approve and execute their sentences, being sin
discretion vested in the reviewing officer to reduce, when d
by him just or expedient, the measure of punishment awar
the court.[2] Its use will be illustrated hereafter.

By whom the Powers may be Exercised unde Article. The Article describes in general terms the pers whom the powers specified may be exercised, by the w "Every officer who is authorized to order a general court-mar A better designation—one more in harmony with the othe visions relating to the action of the reviewing authority— be: "Any officer authorized to execute the sentence of a c martial." As expressed, the Article includes—(1) the of authorized by Arts. 72, 73, 81 and 82, and Sec. 1326, Rev. to order certain courts, and who have ordered such courts, w have adjudged sentences; (2) the successors in command of officers, or "commanding for the time being"—a class al defined in construing Arts. 104 and 109.

An officer thus authorized must of course exercise *person* the powers conferred: he cannot *delegate* the same—to an ferior commander or staff officer—any more than he may d gate the power to order the court or approve its proceedings.[3]

Subject and Limit of their Exercise. The Article auth izes the pardon or mitigation of "any punishment adjudge

1. III Opins. At. Gen., 418; Flanders, Expos. of Const., 172.

2. That the President, when acting as reviewing or confirming offi may exercise the power of mitigation, (which he cannot exercise as c stitutional pardoning power,) was held by Atty. Gen. Berrien, II Op 289. And see DIGEST, 390.

3. DIGEST, 93.

:wo specified exceptions. From the use of the term *punish-* instead of *sentence*, it is apparent that it was intended that ɔwers conferred should be exercised with regard to a pun- nt or punishments as such. Thus where the sentence em- ; several punishments, that or those designed to be remitted tigated should be separately and specifically acted upon. n taken upon the sentence in the aggregate, by which the may be rendered less severe as a whole, while no particular hment is remitted, commuted, or mitigated, will not consti- legal exercise of the authority conferred by the Article.[1]

: Article, in excepting "the punishment of death or of dis- l of an officer," reserves to the President alone the power :doning or mitigating the punishments named. And this ation, being expressed in general terms, is operative even ıe of *war*, when, though these penalties may be finally ap- d and executed by certain military commanders, they can- e remitted or mitigated by them. There seems to be no ent reason why, where the one power is accorded, the other l not also be,[2] but such is the existing law.

rm of Exercise of Pardoning Power by the Presi-

The President, where he is Reviewing Officer, *viz.* when ; upon the sentence of a court convened by himself, or a ıce requiring his confirmation or action, while he may of : exert the plenary power vested in him by the Constitution, ctice almost invariably exercises a partial pardoning power *ission* of the punishment analogous to that conferred upon ving officers by Art. 112. In *other* military cases,—as in ɔf applications or appeals addressed to him for clemency by :s or soldiers, whose sentences have been sometime finally upon by the competent authority and who are undergoing me,—here, where he acts not as reviewing officer but as tutional pardoning power, he exercises a full or limited ıre of such power according to circumstances. In some cases formal pardons were issued by the President to en- men under sentence,[3] but at present, in cases of prisoners

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ee further under "Mitigation," *post.*

'he Act of July 2, 1864, did indeed authorize commanders of de- nts and armies in the field to remit or mitigate these punishments ly "during the present rebellion."

'he early Order books in the A. G. O. contain formal

confined at Leavenworth or Alcatraz Island, the mere remission in Orders[1] of the unexecuted portion of the punishment of imprisonment is the form, commonly, of the act of grace. In cases of *officers* under sentence, formal pardons, in terms similar to the pardons issued to civilian offenders, have more frequently been granted,[2] but even these have not been common.

Attributes of the Power of Pardon or Remission.—1. *It is coextensive with the punishment.* The plenary constitutional power of pardon is said to to be coextensive with the punishment,[3] and so—within its scope—has been held to be the power of remission.[4] Thus its exercise is not restricted to the time and occasion of the formal approval of the sentence by the reviewing authority, but may be resorted to at any stage of the execution of the punishment, and so long as any portion of the same remains unexecuted. What remains, for example, of a term of imprisonment of a soldier may be remitted, at any time before its expiration, by the commander who originally ordered the court and approved the sentence, or by his successor meanwhile in the command, provided of course the soldier is still confined within the command.[5] So, a *continuing* punishment—as one of disqualification to hold office, or of a loss of files—may be remitted at any time during the life of its subject.[6] The President has frequently pardoned military punishments pending the period of their enforcement, and in repeated instances at or near the end of

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by President Monroe to soldiers, under sentence of death for desertion or mutiny, dated March 17, 1817, and March 5, Oct. 13, and Dec. 22, 1818.

1. The President, in remitting punishments, may act through the Secretary of War, in Orders emanating from the War Department, as he may in approving or confirming sentences. See *ante*—"Art. 106."

2. A formal pardon was issued to Fitz John Porter, formerly Maj. Gen., on May 4, 1882; but this in terms only *remitted* the *punishment*, *i. e.* the continuing punishment of disqualification for office adjudged by sentence of court-martial in January, 1863.

3. 'Coextensive with the offence and the punishment'—is the full description. Rawle on the Const., 178; *Ex parte* Garland, 4 Wallace, 380; II Opins. At. Gen., 289, 329; III Id., 418; IV Id., 433; V Id., 582; VIII Id., 283.

4. DIGEST, 93; Simmons § 785.

5. DIGEST, 93.

6. DIGEST, 358; XII Opins. At. Gen., 547; Opins. Id., in the cases of Gen. Porter and Lieut. Nordstrom, of March 15, 1882, and February 1, 1884.

war remitted the unexpired portions of the sentences of :lass of offenders, in and by one and the same General The same course was also pursued by department and nmanders.[2] At present, department commanders are sim- thorized to exercise, and not unfrequently do exercise, :r in question, though, in the cases of the prisoners con- :he two military prisons, the remissions, where accorded, ılly ordered by the President through the Secretary of

may be full or partial. That is to say, where a sen- cludes several punishments, the President, or a com- thereto authorized by Art. 112, may remit all, or one or nd a remission of one will not affect the authority to exe- interrupt the execution of, another or the others.[3] So a punishment may be remitted at one time and another part ;equent time.[4] A full and unqualified remission—it may d—of a particular punishment will operate to remit an al punishment the execution of which is made dependent : execution of the other. Thus a remission of a term, or xecuted portion of the term, of an imprisonment, will penalty of dishonorable discharge directed by the sen- take effect at the end of the full term.[5]

may be extended to a class of persons. The power ;tricted to the pardoning, or remitting of the punishment, le individual at a time. The authority of the President, e pardoning power, to extend amnesty to a *class* of sim-

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›y G. C. M. O. 98 of 1865; Do. 46 of 1866; G. O. 19, Mid. Mil. 66.

;. O. 8, Mil. Div. of the Tenn., 1865, Maj. Gen. Thomas remitted pired terms of 245 military prisoners confined in the military Nashville. And see Do. 26, Id.; Do. 2, 3, 7, Id., 1866—in each a similar authority was exercised in a large number of cases. :ise of the power on the part of commanders of departments tly been affirmed by the Atty. General, in the opinion above ıe case of Lieut. Nordstrom, of February 11, 1884.

:ins *v.* Stevens, 24 Pick. 280. And compare the provision of f Feb. 20, 1863, now incorporated in Sec. 5330, Rev. Sts.

Opins. At. Gen., 418.

EST, 358.

ilar offenders has been affirmed by the authorities,[1] and h repeatedly, by proclamation or general order, offered pard *deserters* who may return to duty within a time specified. instance indeed illustrates another attribute of the power u consideration, *viz.* that it may be exercised prior to the co tion or trial of the offender.[2]

4. It may be unqualified or conditional. That a don or remission may be conditional, and that the condition be *precedent* or *subsequent*, is settled law.[3] During the period pecially of the late war pardons on express conditions were unfrequent in military cases. Thus sentences were remitted the conditions precedent—that the accused re-enlisted, or enli 'during the war;'[4] that he paid back certain bounty money ceived by him;[5] that he paid a fine, or part of a fine imposed his sentence;[6] or gave satisfactory security for its payme that he turned over the company fund in his hands;[8] that he m good an amount found to have been embezzled by him;[9] tha reimbursed the expenses incurred in his apprehension as a serter,[10] or the value of public property, (as a horse, carbine, appropriated in deserting,[11] or that he made good the time lo his absence;[12] that he allotted certain pay sentenced to be

1. U. S. *v.* Klein, 13 Wallace, 141, 147. And see Armstrong *v.* Id., 154; Pargoud *v.* U. S., Id., 156; Cooley, Prins. Const. Law Do., Const. Law, 139.

2. In *military* cases the instances in which the pardoning pow been exercised before trial have generally been of the class kno *constructive* pardons. See *post*—"Constructive pardon;" also of pardon," in Chapter XVI.

3. 2 Hawk., c. 37, s. 45; 4 Black. Com. 401; 1 Bishop, C. L. § 7 S. *v.* Wilson, 7 Peters, 150; *Ex parte* Wells, 18 How. 307; Com. *v.* garty, 4 Brewst. 326; I Opins. At. Gen., 77, 341, 482; V Id., 368; V 405; XI Id., 229; XIV Id., 124.

4. G. O. 3, 6, 104, Dept. of Va. & No. Ca., 1864. Compare 1 Com., 308.

5. G. O. 184, Dept. of Va. & No. Ca., 1864.

6. G. C. M. O. 428, 640, of 1865.

7. G. G. M. O. 117 of 1864.

8. G. C. M. O. 14 of 1868.

9. G. C. M. O. 228 of 1865. And see DIGEST, 359 § 1c.

10. G. O. 29, Dept. of the Platte, 1869.

11. G. O. 32, Dept. of the Platte, 1869.

12. G. O. cited in note 11.

d, or other pay, to the support of his family.[1] Similarly sen-
es of military commissions have been remitted on the con-
n precedent that the accused took an oath of allegiance and
ience to the laws, or gave bond for his future good behaviour,
oth.[2]

, though more rarely, military pardons have been granted on
ess conditions *subsequent*. As where an officer was pardoned
ondition of his resigning his commission;[3] where the sen-
es of soldiers in confinement were remitted on condition that
faithfully served their full terms of enlistment;[4] where,
ertain cases tried by military commission, the sentences were
itted on the condition that the party should forthwith quit a
ain place or part of the country and remain absent during the
[5] or that he should engage in no illicit trade, nor aid or have
rcourse with the enemy, during the war.[6]

'here the pardon is conditional, the condition must be *accepted*
he beneficiary:[7] in military cases, the acceptance is more com-

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G. C. M. O. 214 of 1864; Do. 503, 668, of 1865.

. G. C. M. O. 103, 119, 151, 156, 203, 229, 251, 256, 270, 528, of
5.

; See I Opins. At. Gen., 343.

. G. O. 46 of 1866. And see G. C. M. O. 94 of 1867; G. O. 104,
pt. of Va. & No. Ca., 1864; G. O. 108, Dept. of the East, 1872.
npare the terms of the offers of amnesty to deserters in G. O. 43 of
6; Do. 102 of 1873.

. G. O. 34, Dept. of Washington, 1865. So, it is held in the civil
rts that a condition attached to a pardon of a convict sentenced to
risonment, that he leave the State or the country, and do not return
ing his term or at all, is a valid condition; and that if, after accepting
condition, he does return, he may be remanded to prison to serve
sentence. Flavell's Case, 8 W. & S. 199; Com. *v.* Haggarty, 4
wst. 326; People *v.* Potter, 1 Edmonds, 235; *Ex parte* Lockhart,
isney, 105.

G. C. M. O. 99 of 1865. In Do. 131, Id., the party, sentenced to be
risoned 'to the end of the rebellion,' was "enlarged to remain at
ty so long as he does not misbehave."

"The offender may accept or not at his option." VI Opins. At.
., 405. For "the condition may be more objectionable than the
shment." U. S. *v.* Wilson, 7 Peters, 161. And see V Opins. At.
., 537; Lee *v.* Murphy, 22 Grat. 798.

ome form of acceptance indeed is necessary to give effect to *any*
on. As the court say in U. S. *v.* Wilson, *ante*—"A pardon is a deed
e validity of which delivery is essential, and delivery is not complete
out acceptance." And see In the matter of De Puy, 3 Benedict,
See also DIGEST, 356, where it is held that there can be no pardon

monly indicated, not formally, but by his voluntarily submitti to the proceeding or performing the act required as a conditio As remarked by the court in a case in Pennsylvania[2]—"It upon the grantee to perform the condition. If he does not case of a condition precedent, the pardon does not take effect case of a condition subsequent, the pardon becomes null; an the condition is not performed the original sentence remain full vigor and may be carried into effect."

The condition, whether precedent or subsequent, must be le reasonable, and not repugnant to the grant.[3]

Commutation. Here is to be considered the subject of commutation of sentences, commutation being a form of con tional pardon. Mitigation, as will hereafter be noticed, is a duction of a punishment in degree or quantity only; the po to mitigate not authorizing the changing of the species of penalty adjudged. But there are certain punishments not ceptible of being reduced in degree; consequently where one these is imposed by the court, and the same is deemed too se a penalty to be inflicted upon the accused, who yet, it is con ered, deserves some measure of punishment, the mere powe mitigation is inadequate for the occasion, and *commutation* the substitution of a lesser penalty of a different nature, mus resorted to. Death and dismissal, for example, are punishm

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of a *deceased* person because such a pardon cannot be delivere accepted.

1. In civil cases the condition is often formally accepted in wr upon the pardon by the beneficiary. In *Ex parte* Wells, 18 How 307, the form of acceptance was as follows:—"I hereby accept the a and within pardon, with condition annexed." And see the similar of acceptance in Lee *v.* Murphy, 22 Grat. 790.

2. Flavell's Case, 8 W. & S., 199. Or, as the law is stated by Bis (1 C. L. § 914)—"If the condition of the pardon is precedent, that by its terms, some event is to transpire before it takes effect, its op tion is deferred until the event occurs. If the condition is subsequ the pardon goes into operation immediately, yet becomes void when the condition is broken." In *Ex parte* Wells, the law is stated that where the condition is not performed, "the party may be bro to the bar and remanded to suffer the punishment to which he was inally sentenced." If the conditional pardon has been granted *trial*, and the condition not performed, the party may be brough trial for his offence. See DIGEST, 359 § 9.

3. People *v.* Pease, 3 Johns. Cas. 335. Flavell's Case, *ante;* P *v.* Potter, 1 Edmonds, 235; Com. *v.* Haggarty, 4 Brewst. 326.

admitting of lesser degrees or capable of being mitigated; must therefore, when deemed too rigorous, be exchanged or muted for distinct penalties of minor severity.

hus death may be commuted to dismissal or dishonorable dis-ge, or to imprisonment, or to both,—indeed to any recog-d military penalty or combination of penalties, since any such ılty or combination is in law less grievous than the *summum licium* of death. So, dismissal may be commuted to suspen-,[1] loss of files, or other punishment appropriate to an officer less severe than an absolute and disgraceful separation from ırmy.[2] And, in a case of an enlisted man, a sentence of dis-orable discharge or reduction to the ranks may be commuted moderate forfeiture of pay.

is to be noted, however, that commutation, though more ropriate to cases of punishments which do not admit of miti-on, is not restricted to these in its application. It thus may resorted to in cases where mitigation is permissible and in ı thereof. Thus a considerable term of imprisonment, instead eing mitigated to a less term, may be commuted to a forfeiture ı small amount of pay.[3]

ıs above indicated, the proceeding of commutation, according he weight of authority, is to be viewed as a pardon or remis-ı of the punishment on the condition subsequent that the y willingly receive and undergo a less severe punishment of fferent nature[4]—a condition which, like all conditions an-

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Suspension has indeed sometimes been regarded as an inferior de-of the punishment of dismissal, and as a penalty to which the lat-ıight therefore be *mitigated*. (See IV Opins. At. Gen., 434; V Id., . But such view is a mistaken one, dismissal being an absolute and separation of the person from the military office and from the y—a status admitting of no degrees. Dismissal is therefore *com-d*, not mitigated, when suspension is substituted for it by the par-ng power.

Dismissal has in a few cases been *commuted* to reprimand. See ınce in G. C. M. O. 18 of 1868.

In substituting one distinct punishment for another by commuta-special care is to be taken that the rule forbidding any *adding to* ınishment by the reviewing officer is not transgressed.

As to the nature of commutation as being a form of conditional on, see DIGEST, 93 § 5. The leading adjudged case on the subject r *parte* Wells, 18 Howard, 307, with which see Opinion of the Jus-14 Mass. 472; Perkins *v.* Stevens, 24 Pick. 278; Lee *v.* Murphy, at. 789; Cooley, Prins. Const. Law, 100;—also V Opins. n which is practically overruled an earlier opinion of

nexed to pardons, must be accepted or the grant will nc effect. In military cases, the acceptance is in general giv formally, but impliedly by the party's entering upon objection, and duly undergoing, the substituted punishme

Like other conditional pardon, commutation is, in p employed at the time of the approval or confirmation of tence or punishment: unlike remission, it is rarely if ever to at a later stage.

Constructive Pardon. A party may sometimes be of punishment by an executive act attaching to him a st consistent with the infliction or continuance of such puni An act of this character operates as an implied, or, as it is designated, *constructive* pardon.[2] Thus the appointme new office of an officer in arrest under charges will op pardon constructively the offence with which he is a So, the promotion of an officer under sentence of suspensi rank, or the replacing in his proper command, by authori petent to remit the sentence, of an officer under sentence

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I Opins. 328, in which commutation is confused with mitigation. be added that the phraseology of some of the existing statute also tended to confuse the student. Thus, while the Act of 1866, provided that in time of peace no officer should be dismi cept in pursuance of the sentence of a general court-martial *commutation* thereof," using here the proper term, this term, retained in one part of the Revised Statutes,—Sec. 1229,—h carelessly changed to "*mitigation*" in the 99th Art. of war anc 36 of the naval code.

It may be noted in this connection that the naval code—in and 33—expressly prohibits the commutation of sentences.

The provision of the modern British code corresponding to c 112—Army Act § 57. (1.)—expressly empowers the reviewing a to '*remit, mitigate, or commute*' punishments adjudged by sen court-martial,—a form of conveying the power much to be prefe that retained in our statute.

1. See *ante* as to acceptance of conditional pardons in general

2. DIGEST, 359; VI Opins. At. Gen., 715. But the mere o of an officer under sentence of suspension to attend a court-mart witness, does not operate as such pardon. Id., 714.

In Sir Walter Raleigh's Case, (Cro. Jac., 495; Prendergast, was held that had his offence been less than treason,—had it be felony,—his being released from imprisonment while awaiting t cution of his sentence, and placed in command of an army and a foreign expedition, would have operated as an implied pardon.

3. VIII Opins. At. Gen., 237; DIGEST, 358.

ısion from command, will constructively pardon and terminate suspension.[1] So, the ordering on active duty of a soldier ler a sentence of confinement will have the same effect as a nal remission of the punishment.[2] Similarly, a *constructive* .ission of a sentence of confinement of a soldier is effected :re, pending the execution of a confinement adjudged to be ered during the remainder of his term of enlistment, a dis- rge from the service is given him by competent authority.[3] 'he subject of constructive pardon, as granted prior to trial, already been considered under the title of the Plea of Pardon, :hapter XVII.

Mitigation. This, which, as already observed, is distinct from not included in the pardoning power,[4] differs from commuta- . in that it consists, not in changing the quality of the pun- nent or in substituting a different punishment for it, but sim- in reducing it in quantity.[5] Thus an imprisonment or sus- sion adjudged for a certain term is mitigated by reducing it ne for a less term;[6] a fine or forfeiture of a certain amount, reducing it to one of a less amount;[7] a loss of a certain num-

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IV Opins. At. Gen., 8; VI Id., 123, 715; McNaghten, 22; DIGEST, . But allowing an officer under sentence of suspension from rank to ı over property, &c., with a view to settling his accounts as acting rtermaster, has been held not to have any such effect. DIGEST, 359.

. See De Hart, 249; Benét, 168; G. O. 98, Dept. of the East, 1868.

. This ruling of the Judge Advocate General was approved by the retary of War, and communicated to department commanders, from A. G. O., under date of Aug. 12, 1871. See the same, (published as a ision of the Secretary,) in G. O. 72, Dept. of Dakota, 1871; G. C. M. O.), Dept. of the Mo., 1871; Circ., No. 15, Dept. of Texas, 1871.

4. That the President may exercise the power of mitigation only in : capacity of reviewing officer, see note *ante*, citing II Opins. At. Gen., 9; DIGEST, 390.

5. "The right of *mitigating* only extends, in my opinion, to lessening : degree of punishment in the same species prescribed, and does not ply any authority to change the nature or quality of it altogether." ashington to Gates, Feb. 14, 1778. Spark's Writings of Washing- n, vol. 5, p. 236. And see DIGEST, 93; Circ. 2 of 1885; also I Opins. . Gen., 328, 331; IV Id., 433, 446. [These Opins., however, so far as y relate to *commutation*, were corrected by V Opins. 369. See note k.]

6. In the late war, imprisonments for life or for very long periods were : unfrequently mitigated to imprisonment "during the rebellion"

7. A general forfeiture of pay, imposed in connection nt, has sometimes been mitigated by directing the

ber of files, by reducing it to one of a fewer number.[1] The ishment as mitigated must be *ejusdem generis* with the ori that is to say must be a part of the very punishment impos the court.[2]

Pardon and mitigation, though separate functions, may co in action. Thus where a sentence imposes imprisonment an feiture, the reviewing authority may at the same time remi imprisonment and mitigate the forfeiture, or *vice versa*.

A mitigation must of course be preceded by an approva confirmation, in whole or in part, of the sentence, since, if sentence is wholly *disapproved*, there remains nothing to be r gated. The punishment at least which is mitigated must l been approved, although other punishments contained in the s sentence may have been disapproved. But mitigation, unlik mission, (and *like* commutation,) is rarely if ever employed stage subsequent to the approval or confirmation, but, in prac is contemporaneous with and a part of the same action.

As already noticed, the power conferred by Art. 112 is to n gate, &c., a *punishment*, not the *sentence*. So, where a sent contains several punishments, action taken thereon which tracts from the severity of the sentence in the aggregate but not specifically reduce any punishment as such, is not a legal ercise of the power of mitigation. Thus where a court-mar sentenced a soldier to be dishonorably discharged and then prisoned for a certain term, and the reviewing officer direc that the discharge be *postponed* till after the imprisonment, it held by the Judge Advocate General that this action was not le mitigation and was unauthorized.[3] A case illustrating the s point and also the principle that an adjudged punishment can

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$10 or $20, or 'so much of that amount as may be found due the sol on the settlement of his account,' be retained and paid him on his charge from confinement. See, for example, G. C. M. O. 1, 4, 8, 10, Dept. of the South, 1881. The object of this form of mitigation i provide against the party's being discharged in a destitute conditi *practically*, it is uncertain and scarcely to be recommended in gener

1. Or a public reprimand to a private. G. O. 31, Dept. of the E 1868. So, a sentence of imprisonment for three years in a penitent has been held to be "mitigable to an imprisonment for two years military prison." DIGEST, 94.

2. See I Opins. At. Gen., 327; IV Id., 434, 447.

3. See this opinion published as approved by the Secretary of in G. O. 71 of 1875, and incorporated in par. 905, Army Regs.

ded to, was that of a naval officer in which it was held by tty. General that the President could not legally mitigate tence of five years' suspension from rank to one of six hs' suspension with forfeiture of pay for the same period, igh by such action the sentence would as a whole be ren- less severe.[1]

ounds of Pardon or Mitigation. The subject may well ustrated by noting here some of the principal grounds upon n the discretion to "pardon or mitigate" has been, in prac- exercised under the Article. Among these, which are as l as the circumstances of the different cases tried, are the ving:—That the accused had been formally recommended mency by members of the court; that his previous general cter or conduct had been exemplary; that his record in war dian hostilities had been good; that he had received a wound tle or a certificate of merit; that the war services of his father nily had been distinguished; that he had behaved with gal- y before the enemy since the commission of his offence; he had been required to take part or had voluntarily taken in an engagement while under arrest; that he had been held nreasonable time in arrest or confinement before trial, or awaiting action on his sentence; that he had already been cted to a disciplinary punishment by his commander; that id been punished by the civil authorities for the civil offence ved in his act; that he had never had read to him, or been in- ed of, the Articles of war; that he had been but a short time e United States, or had but an imperfect knowledge of the ish language; that he was a recruit or unusually young and perienced; that he had been required to perform an unrea- ble proportion of an onerous duty; that he had been im- erly put on duty when under the influence of liquor; that, deserter, he had voluntarily returned or surrendered himself; his offence had been induced in part by the harsh treatment njustifiable conduct of a superior, or had been attended by mstances of provocation or extenuation to which the court not given sufficient weight, or—the punishment being man-

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[1] V Opins. At. Gen., 444. And see V Id., 46. Action which dimin- the severity of the sentence as a whole, by mitigating nd increasing another, would, as to the *latter* proc- operative.

datory—could not legally allow to affect the sentence; that health was such that he could not safely undergo the confinement adjudged; that his conduct had been good in confinement; that he had become morally reformed; that a remission of his sentence had been asked for by civil officials or other citizens of high standing; that he had testified fully and honestly as a material witness for the government on another trial. In cases of *officers*, the more usual grounds have been that their military record, especially in war, has been distinguished, or their public service valuable; that they have borne a high personal character; that their offences were not apparently actuated by a fraudulent or criminal intent; that they had made good to the United States or to individuals the losses occasioned by their misconduct; that they were wholly unable to satisfy a fine imposed by the sentence; that the payment of a forfeiture adjudged would impoverish their families, &c.

These and similar circumstances, while, (unless connected with the merits of the case,) not such as legitimately to affect the judgment of the *court*, may, especially when two or more exist in combination, properly be taken into consideration by the Reviewing Officer in determining how much of the sentence it may be just or expedient to execute.[1]

VIII. FORMULATING OF ACTION AND PROMULGATION.

Statement of Approval, &c. It is directed in the Army Regulations, par. 918, that the reviewing authority "shall state at the end of the proceedings in each case his decision and order thereon;" but no *form* for the statement of the action of such authority is prescribed in the military code.[2] Usage, however, has indicated a form for the purpose which is in general substantially followed. This form, (given in the Appendix,) consists of

1. See Chapter XXI—"Principles governing the imposing of discretionary sentences." In a case in G. C. M. O. 103, Hdqrs. of Army, 188[illegible] in which the court had added to its sentence the following—"The court is thus lenient in view of faithful service before and after desertion and the good character of the accused," it was remarked as follows by Gen. Sheridan: "The Lieutenant General is of opinion that the better practice is for a court-martial to award punishment appropriate to the offence established, leaving it to the reviewing authority, in the excercise of his vested powers, to take into consideration previous good character."

2. See Vanderheyden *v.* Young, 11 Johns. 150.

al statement, (with a proper heading, designating the
:ters, &c., place and date,) to the effect that the proceed-
lings and sentence in the case of—(naming the accused)—
ved or disapproved, in whole or in part; or that the pro-
and findings are approved in whole or in part, and the
punishment or punishments, is or are remitted, com-
r mitigated, as the case may be; with a direction as to
sition of the prisioner in case of conviction, designa-
lace of confinement if imprisonment be adjudged, &c.
ie sentence is one required to be executed at once in con-
vith the approval, as is usual in a case of a reprimand,
al administering of the reprimand is added. The state-
hich, where no more cases are to be tried, generally con-
ith an order dissolving the court,) is subscribed by the
g officer in his official capacity.
the sentence is one requiring the action of the President,
superior,) the statement, after the formal approval,
nd the proceedings are hereby forwarded for the action
esident,' &c., or in terms to such effect.

r of Suspension." Where the action authorized by
is resorted to, the statement, after the approval, proceeds
iat is referred to in the Article as the "order of suspen-
iich is simply a declaration to the effect that the execution
ntence is suspended until the pleasure of the President
known, and that the proceedings are accordingly trans-
him for his action, under the Article.

nent of Confirmation, &c. The action of the Presi-
superior commander,) as confirming authority, is simply
statement to the effect that the sentence in the case is
l and will be executed; or that it is disapproved, remitted,
ianner specified, commuted or mitigated, as the case may
atement being authenticated by the proper official signa-
s above remarked, the action, here, of the President may
e attested by the Secretary of War: it is the present
however, for the President to subscribe the same in

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nte—"Action of the President as Confirming Authority—Art.

Action to be Attached to Record. The action of the [illegible] inal reviewing officer is properly written upon a blank page a[illegible] end of the record or a sheet attached thereto, below or afte[illegible] sentence, adjournment, or other final proceeding of the cou[illegible] the case.[1] The action of the President, &c., if any, is prop[illegible] written below or after that of the original reviewer.

Accompanying Remarks. To the *formal* action or or[illegible] thus indicated, the commander or President may, if he thi[illegible] proper, add such reflections upon the proceedings or conclusi[illegible] of the court, the conduct of the prosecution or defence, the ma[illegible] up of the record, &c., as the facts may warrant. Such comm[illegible] have the more frequently been resorted to where the finding, [illegible]tence, &c., has been in whole or in part *disapproved:* the sa[illegible] however, have been not unusual where it has upon the whole [illegible] deemed expedient that the proceedings or sentence should b[illegible] proved. In some instances the remarks have taken the for[illegible] emphatic stricture or censure. Thus courts have been sev[illegible] criticised for acquitting where, in the opinion of the revie[illegible] officer, the testimony called for a conviction;[2] for imposin[illegible] tences regarded by him as inadequate to the offences found;[illegible] findings held by him to be unwarranted by the proof;[4] for err[illegible] in admitting or rejecting evidence;[5] for ignorance or neglect in

1. It is to be noted that the action taken upon the proceedings of *inferior courts* is often less detailed than here described, consisting sometimes in the mere signing, by the regimental, post, &c., commander, of the single word "*Approved,*" written at the foot or in the margin of the record. Usually, however—and more properly—a formula, similar to that employed for the proceedings of general courts, but briefer and simpler, is adopted.

2. See G. O. 81 of 1822; Do. 23 of 1824; Do. 4 of 1843; Do. 2 of 1844; Do. 6 of 1858; Do. 250, 385, of 1863; Do. 74, Army of the Potomac, 1862; G. C. M. O. 112, Dept. of the East, 1870.

3. See G. O. 64, 68, of 1843; Do. 39 of 1845; G. C. M. O. 88 of 18[illegible] Do. 123 of 1865; G. O. 85, Dept. of the Gulf, 1862; Do. 21, Dept. of the Tenn., 1863; Do. 22, Dept. of the Platte, 1867; G. C. M. O. 50, 80, Dept. of the Mo., 1871; Do. 37 Id., 1875. In G. O. 78, Dept. of So. Ca., 18[illegible] the action of the court is commented upon as inconsistent in its adjudicating sentences differing very considerably in severity in cases "entirely similar."

4. See G. O. 81 of 1822; G. C. M. O. 88 of 1864; Do. 123 of 1865.

5. See G. O. 23 of 1824; Do. 4 of 1843; Do. 1 of 1861; Do. 18[illegible] Dept. of the Ohio, 1863; Do. 51, Dept. of the East, 1864; G. C. M. O. 11, Army of the Potomac, 1864.

g grave irregularities in the proceedings or form of the rec-
for the personal misbehaviour of the members,[2] &c. The
.ct not only of the accused[3] but also of the prosecutor or
: preferring the charges has also been reflected upon,[4] as well
ıt of superiors of the accused whose acts, deemed illegal or
ɔper, have been regarded as having induced or aggravated
ffences committed,[5] or that of other officers implicated with
ccused or otherwise culpable.[6] In rare cases even a subor-
e commander who has acted upon the proceedings has been

See G. O. 185, Dept. of the Ohio, 1863; Do. 64, 68, Id., 1864; 9, Northern Dept., 1864; Do. 51, Dept. of the East, 1864; Do. ept. of the South, 1864; Do. 4, Dept. of N. Mexico, 1864; Do. wenty Fifth Army Corps, 1865; Do. 25, Dept. of So. Ca., 1866; 5, Dept. of the Cumberland, 1867; Do. 33, Dept. of Arizona, 1871; 8, Id., 1876; G. C. M. O. 8, Dept. of Miss., 1865. In G. O. 64, of the Ohio, 1864, Gen. Schofield, in ordering that the members judge advocate of a certain court, (whose neglect and careless- had been exceptional,) "be and they are hereby reprimanded," :—"The Asst. Adjt. Gen. of the Department is hereby cautioned ıst putting any officer of this court on any important court-mar- duty. Of the entire number of cases tried by this court, at least :-tenths have been disapproved for fatal irregularities."

· In G. C. M. O. 123 of 1865, the Secretary of War, in commenting ın the findings as not in conformity with the evidence, and upon the tence as inadequate, adds :—"The reviewing officer also reports that members of the court were guilty of conduct prejudicial to good er and military discipline in drinking with the accused at various s, and holding private conversations with his counsel, and of other gularities," and he thereupon proceeds to summarily *dismiss* all the ıbers of the court, as well as the accused, from the service.

In a recent G. C. M. O., Dept. of Dakota, (134 of 1884,) Gen. y reflects severely upon an accused officer for taking advantage of ɔrivilege allowed to a person on trial, by assailing and insulting his rior officer both in his cross-examination of the latter as a witness in his statement to the court.

In reviewing a case in G. O. 86, Dept. of the Mo., 1867, Gen. ock remarks, generally:—"There being no evidence shown by the rd to sustain any one of the charges or specifications, the case has ppearance of a malicious prosecution to gratify personal resentment. refer accusations which cannot be maintained is highly injurious to service and reflects discredit upon those who prefer them; and if ı trial the charges are found to be groundless, the officer preferring ı should be held accountable, and be tried himself for preferring cious charges." And see G. O. 42 of 1851; Do. 239 of 1864; Do. Dept. of the Cumberland, 1867.

· See G. O. 62 of 1863; Do. 22, Dept. of Dakota, 1868; Do. 25, Id., 3; G. C. M. O. 5, 38, Dept. of Texas, 1873; Do. 43, Id., 18

· G. O. 39, 41, 46, of 1835.

censured.[1] Observations, suggested by the evidence, upon matters affecting discipline or other interest of the service, have sometimes also been promulgated.[2]

In this connection, it may be said that where the subject of unfavorable criticism is an error capable of being corrected, the return of the proceedings to the court for the purpose is but just to the court that this course should first be pursued. Further, the reviewing authority, if he deems it his duty to indulge in reflections such as above instanced, should in general, where practicable, confine himself to comments upon *facts*, and rather than resort to direct strictures upon individuals, should prefer or cause to be preferred against them formal charges. Such strictures, however, are in some cases quite legitimate, and cannot be avoided: in such cases if the party reflected upon demands a trial by court-martial for the misconduct imputed, his application cannot in general fairly be denied.

Order of Promulgation. This is the formal written or printed General, (or Special,) Order, in and by which, by the invariable usage of the service, the final reviewing authority publicly announces his action, (and that of a previous reviewing officer, if any,) upon the proceedings of the court in a case tried. It consists simply of a re-statement of such action, (with the accompanying remarks, if any,) as originally written and subscribed in or upon the record as above indicated, preceded by the details

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1. In G. O. 25, Dept. of So. Ca., 1866, Gen. Sickles, in remarking upon fatal errors appearing in a considerable number of cases, censures the original reviewing officer—a District commander—for repeatedly permitting records containing errors to pass through his hands, without having them returned for correction to the court, and thereupon proceeds to revoke an existing order by which the District command had been designated as a "separate brigade,"—thus divesting the commander of the power to convene general courts.

2. See cases in James, 500, 501, 694, 831, 832. And see unfavorable comments on the course of official business, in Gen. Talcott's case, G. O. 36 of 1851. In G. O. 43, Dept. of Cal., 1867, Gen. McDowell, in observing that several soldiers belonging to the same command, in pleading guilty to the charge of desertion, "allege, as the reason for committing it, that the comfort of the soldier is neglected, that the food is insufficient, that an undue proportion of the ration is sold for the purpose of forming a company fund, and that reports that the rations were made away with were not attended to,"—orders that the District commander "will immediately investigate the matters contained in these allegations, and will report the result to these Headquarters."

: and sufficient to identify the particular case, *viz.* a desig- of the court, and a recital of the charges and specifications,[1] eas, (including special pleas,) the findings, and the sentence e of conviction; the whole being headed by the name of eadquarters from which issued, the date of issue, (which . preferably be identical with that of the original action,[2]) ie number of the Order in the current series. Where the has been returned to the court for correction, this fact, ier with the procedure upon the revision, is sometimes set but such mention is in general neither necessary nor de- e.[3]

: Order is mainly useful—1st, as a publication to the Army result of the trial, and of the opinion of the commanding al, and, (where his action is required,) that of the President, the proceedings; 2d, as forming a permanent and con- it memorandum of the more material particulars of the for general reference and use in evidence; 3d, as consti- actual or presumptive *legal notice* to the accused of the ive sentence or other conclusion of the court, and of the val, disapproval, remission or mitigation by the reviewing ity. As already observed, upon the subject of the execu- punishments, the day upon which the order promulgating proved sentence is published to the command, or served and made known to the accused in person,[4] is that on and which a sentence of dismissal, disqualification, suspension, files, or reduction, in general takes effect, and the rights party to pay, rank, &c., are divested or affected. 4th. It e added that in cases in which imprisonment is adjudged, e of the Order of promulgation fixes, as heretofore noticed,[5] te at and from which the term of the imprisonment begins executed in law.

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he specifications are sometimes omitted, but should always pref- be inserted except where they are too numerous or extended, or h grossly indecent language or matter otherwise improper to be ed.

hat the dates should be the same is now directed in G. O. 103 of

IGEST, 354.

ot only where the accused is sick, a prisoner, &c., and cannot be at the publication of the Order to the command, but in *all* cases, of the Order should be furnished to him personally.

hapter XX—"Imprisonment."

The Order, however, though thus important, is not essential to the execution of the sentence or otherwise, and may be wholly dispensed with.[1] This for the reason that the same is not an original proceeding and contains no original matter, its details being merely *copies* of the original particulars contained in the record and of the action taken upon the case. Not being original it is not signed as such; the signature of an assistant adjutant general or other staff officer, sometimes appended to it, being simply for the purpose of authenticating it as a true copy.

As a form merely of publication, the Order, if found to contain an error or errors, may be withdrawn or cancelled and a new and correct form substituted, or it may be amended by a supplementary Order specifying and rectifying the mistake.

Special Action in case of Acquittal. In such a case, if there is likely to be any material delay in the issuing of the Order promulgating the proceedings, the commander properly may, and in practice not unfrequently does, direct that the accused be forthwith released from arrest and restored to duty. In the absence of such anticipatory action, an officer or soldier fully exculpated on his trial might be held in underserved restraint, and subjected to unnecessary suffering or humiliation, for a considerable period, while awaiting the publication of the formal Order.[2]

IX. DISPOSITION OF RECORDS.

Transmittal of Records of General Courts. Par. 919 of the Army Regulations directs that—"Proceedings of general courts-martial will be transmitted by the commander who appoints the court * * * directly to the Judge Advocate General." The last duty of the military reviewing officer, after fully

1. See DIGEST, 354. In any event—whether or whenever the proceedings are formally promulgated—the accused should be notified of the result as promptly as is reasonably practicable. Note remarks of Samuel Warren, (Letter to the Queen on a late Court-Martial, p. 254-5,) on the cruelty of keeping an accused long in ignorance of the result of his trial.

2. In an Act of the Confederate States Congress, of June 14, 1864, relating to the proceedings of military courts, it is provided that, in cases of acquittals, "*the finding of the court shall be announced immediately, and the person so tried and acquitted, if a soldier, shall be released from arrest and returned to duty; and if other than a soldier, discharged from custody, without awaiting the examination or report of the reviewing officer.*"

ıg upon the proceedings of a general court, thus is to forward record to Washington, to the Judge Advocate General of the ıy, who is made by statute the legal recipient and custodian ıch proceedings. The duty of the commander is the same ther the case is one in which his approval or other action is , or one in which action by the President is still required. transmittal is by mail or express: in cases of unusual public ɔrtance the records have sometimes been conveyed by the e advocate of the court or other officer detailed for the pur- . A copy of the order of promulgation, if any, is properly ɜmitted with the record.

ısposition of Records of Inferior Courts. It was pro- l by the Act of March 3, 1877, that all records of inferior :s-martial, after being duly acted upon by the proper com- lers, should in future "be retained and filed in the Judge ɔcate's office at the Headquarters of the Department Com- ler, in whose department the courts were held, for two years, : end of which time they may be destroyed." Under this te this class of records have at the proper time been destroyed ırning.

CHAPTER XXII.

INFERIOR COURTS-MARTIAL, AND MILITA BOARDS.

INFERIOR COURTS-MARTIAL.

There are known to our law two species of Inferior Co Martial, which will be considered in this Chapter under the t respectively of—

I. Regimental and Garrison Courts-Martial.
II. The Field Officer's Court.

I. REGIMENTAL AND GARRISON COURTS-MARTIA

The Law on the Subject. Courts for inferior commands been authorized by our military codes from the beginning. substance of the earlier Articles still remains; the variations w the law has undergone will be noticed as we proceed. Th *isting* statutory law relating to these courts and to the ta of action upon their sentences is contained in Arts. 81 to 83, 84, Art. 104, Art. 109, and Art. 112—as follows:

"ART. 81. *Every officer commanding a regiment or corps s subject to the provisions of article eighty, be competent to app for his own regiment or corps, courts-martial, consisting of officers, to try offences not capital.*

"ART. 82. *Every officer commanding a garrison, fort, or place, where the troops consist of different corps, shall, subj the provisions of article eighty, be competent to appoint, for garrison or other place, courts-martial, consisting of three off to try offences not capital.*

"ART. 83. *Regimental and garrison courts-martial, and officers detailed to try offenders, shall not have power to try ca cases or commissioned officers, or to inflict a fine exceedin month's pay, or to imprison or put to hard labor any non-co sioned officer or soldier for a longer time than one month.*[1]

1. As to the British courts-martial, other than General, *viz.* th trict, Regimental, Field General, and Summary—see Army Act, 48, 49, 55.

'ART. 84. *The oath administered to the members of a general rt-martial 'shall also be taken by all members of regimental and rison courts-martial.'* * * *

ART. 104. *No sentence of a court-martial shall be carried into cution until the whole proceedings shall have been approved by officer ordering the court, or by the officer commanding for the e being.*

'ART. 109. *All sentences of a court-martial may be confirmed ' carried into execution by the officer ordering the court, or by officer commanding for the time being.* * * *

'ART. 112. * * * *Every officer commanding a regiment or rison in which a regimental or garrison court-martial may be l, shall have power to pardon or mitigate any punishment which h court may adjudge.*"

'he province and function of a Regimental Court, when acting as a court but in quite a distinct capacity under the provis- s of Art. 30, will be separately considered in Chapter XXV.

'he law of Regimental and Garrison Courts-Martial, as now blished, will be presented under the following heads: 1. Con- ıtion; 2. Composition; 3. Jurisdiction; 4. Power of Punish- ıt; 5. Procedure; 6. Action upon the Proceedings; 7. Dis- tion of Records.

onstitution. Arts. 81 and 82 authorize the convening of in- or courts by three sorts of commanding officers:—Commanders Regiments; Commanders of "Corps;" and Commanders of isons, forts, or other places, "where the troops consist of erent corps." The courts convened under Art. 81 are com- ıly distinguished as "Regimental," and those convened un- Art. 82 as "Garrison" courts: regimental courts proper, how- r, are those ordered by the first-named commanders only.

Commanders of regiments. The "officer commanding a iment," referred to in Art. 81, is the colonel, or other officer command of the same whatever be his rank. But he must be the actual command of the regiment *as such*, and competent ssue orders to it as a body. The command must subsist as a imental organization; if companies are detached so that no er properly commands it as a regiment, a *regimental* court ıot legally be ordered in or for it under Art. 81.

Commanders of corps. The term "corps" may have dif ent significations in different connections. As employed in 81, it is deemed to signify a separate integral portion of the a (other than a regiment,[1]) "organized by law with a head members." It must be complete within and of itself, not a made up of detachments from different commands tempo acting together.[2] Further, it must contain not only a fo soldiers enlisted for or incorporated in it, but also officers missioned in or for it as such who may compose the court co plated by the Article. The Corps of Engineers, (includi engineer battalion,) as organized under Secs. 1094 and 1151 Sts., completely answers this description, and the Chief gineers is authorized to convene a court as a command "corps" in the sense of the Article. The same has bee in regard to the Chief of Ordnance, in view of his separat mand of officers and enlisted men authorized and organized Secs. 1094, 1159 and 1162, Rev. Sts. So, the Signal Co now constituted, by the Act of June 20, 1878, and other st of both officers and enlisted men under the command of the Signal Officer, is properly such a corps as here contemp On the other hand, the Corps of Cadets of the Military Ac is not regarded as a "corps" within the meaning of Art. cause it comprises no commissioned officers of the army an no material out of which the commandant could compose for it as a "corps." The Superintendent of course, as comm of the post of West Point, where the force always consi "different corps" in the sense of Art. 82, may convene *ga* courts for the trial as well of cadets as of the enlisted men army on duty at the post.

"Corps" courts, as such, even when clearly authoriz rarely resorted to in our practice; general courts, or—where l convenable—garrison courts, being commonly employed in

Commanders of garrisons, &c. While Art. 81 auth courts for commands consisting of a single element, *i. e.* co ing only officers and men of one and the same organizatio

1. The Article distinguishes it in terms from a regiment. So i be regarded as distinguished from any component of a regiment c tiple of regiments—as a company or a brigade.

2. See Scott's Military Dictionary—"Corps."

3. DIGEST, 63.

provides for the assembling of courts in commands of a *com-ite* character. The one Article is thus the complement of the er.

Construction of Art. 82—"Where the troops consist of ferent corps." The first point to be noticed in construing is Article is that the term of description—"where the troops sist of different corps," is, according to the weight of author-, to be understood as general, *viz.* as applying not merely to words "other place," but also to the words "garrison" and rt."

'he original British article relating to inferior courts for mixed mands would seem to have distinguished between command-of 'districts, garrisons, forts, castles, or barracks,' *as such*, as class, and commanders of 'towns or places where the force made up of detachments,' as a separate class.[1] The context punctuation, however, of our own earliest Articles of 1775 1776, favor the view that the limitation—"where the troops sist of different corps" was intended to apply alike to all the mands previously specified;[2] and though this punctuation modified—by the dropping of the comma before "where"—he Articles of 1786 and 1806, it has been revived in the code 874. Moreover, that the limitation was a *general* one was rly the construction of Major General Scott in the General Or-presently to be cited,[3] and was evidently also that of O'Brien :[4] her, it was expressly ruled to the same effect by Judge Ad-ate General Holt,[5] and this view is now uniformly acted upon ractice. If it be objected that this interpretation would pre-le from convening a court-martial the commander of a garri-whose force was wholly made up from a single corps or arm the service, it may be answered that it can scarcely happen t a properly constituted garrison command will be so entirely ple; one or two representatives at least of some corps other n that composing the body of the command being almost in-ably present with it.[6]

. See Samuel, 622.

. And the same is to be inferred from the British article of 1765 from ch our own was immediately derived. See Appendix.

. G. O. 5 of 1843, cited *post.*

. Page 288.

. DIGEST, 64. And see G. O. 13, Fourth Mil. Dist., 1867, cited *post.*

. See *post*—"Meaning of 'different corps.'"

Meaning of "other place." As to the term "other this, it is to be observed, is a designation of the most hensive character, including any camp, post, barracks, l rendezvous, hospital, arsenal, transport, or other situatio cality whatever at which there may be stationed, or m porarily remain, a command of the nature contemplated Article.[1]

Meaning of "different corps." In the original ar 1775 the language employed was: "where the troops un command consist of detachments from different regiment independent companies." The term "*different* corps" thus appear to have reference primarily to detachment different arms or branches of the military force serving tog as infantry and cavalry, artillery and engineers, &c. By t struction, however, already indicated as announced from Headquarters in 1843, a significance was attributed to the d tion, "where the troops consist of different corps," whic siderably enlarged their purport and application. This wa to fix upon the command the character of one consisting o ferent corps," and to authorize its commander to convene rison court, it is sufficient that there should be on duty w command, as a part of it, a *single* representative only—off enlisted man—of some arm or component of the military lishment other than that one of which the command, wi exception, is made up.[2] Thus, if the body of the comman sists of a regiment of infantry, it will be sufficient for the p indicated if there be stationed or serving with it an off enlisted man of a cavalry or artillery regiment, or of any l of the staff of the army, as, for example, a medical officer c pital steward, officer or non-commissioned officer of the qu master or subsistence department, chaplain, &c.[3]

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1. DIGEST, 64.

2. This construction, as expressed by General Scott in G. C 1843, was as follows:—"In order that the practice throughout the under the second sentence of the 66th Article of war, may be un it is published for the information of all, as the opinion at General quarters, that the presence on duty of an ordnance sergeant, lik of an officer or man of any other different corps, at any milita garrisoned with troops, gives to its commanding officer the legal to appoint garrison courts-martial for the trial of petty military o committed at the same."

3. DIGEST, 64. And see O'Brien, 288; Coppée, 41. In G.

Rank of the commander, in general. As observed of the mmander of the "regiment" or "corps" specified in Art. 81, is not necessary that the commander of the "garrison, fort, or her place," should be of the degree of a *field officer*. To emwer and enable him to assemble the court he need only be a *ie* officer, with *four* officers under him eligible to serve as memrs and judge advocate.

The commander as accuser, &c. Inasmuch as the prosion of Art. 72, in regard to the contingency of the convening mmander being "accuser or prosecutor," does not apply to inrior courts or cases of enlisted men, the commander of a regient, garrison, &c., is authorized to convene a court-martial ider Art. 81 or 82, although he may be the actual accuser or osecutor of the party, or a party, to be tried. It is of course sirable that the officer constituting the court should not be the rson from whom the charges emanate or who is the prosecuting itness in the case; but the requirements of discipline may somemes necessitate that the two characters be united where the mmand is a small one or the exigencies of war enjoin immeate action.[1]

Form of convening order. Until recently no judge advote was detailed with regimental or garrison courts, but the nior member acted as *recorder*.[2] *Now*, in view of the comprensive provision of Art. 74 of the present code, a judge advocate ay be, and in practice is, appointed in the convening order prely as in an order convening a *general* court.[3]

In view of the injunction, applicable to both species of courts, f Art. 94, the commander may properly convey in the order a pecific authority to "sit without regard to hours:" occasion for

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ourth Mil. Dist., 1867, Gen. Ord states the law as follows:—"At posts here, in addition to the troops, forming the chief part of the garrison, ere is on duty an officer or enlisted man of the Ordnance, Medical or other Corps, as a hospital steward or ordnance sergeant, the Comding Officer can, if a sufficient number of officers are present, conte a Garrison Court-Martial and act on the proceedings, in accordte with the 66th and 89th" (now 82d, 109th and 112th) "Articles of r."

DIGEST, 56.

O'Brien, 289; De Hart, 129; Macomb, 86; G. O. 49 of 1871.

DIGEST, 296; G. O. 15 of 1880, incorporated 202, Army s.

adding this, however, is much less frequently presented than in orders convening general courts.

In time of *war*, in view of the provisions of Art. 80, a statement is sometimes appended in an order detailing a regimental or garrison court to the effect that the same is resorted to for the reason that it is impracticable to convene a field officers' court. Such statement, however, is not an essential; and, where not employed, the law would presume from the face of the order that the court was authorized and legal.[1]

Composition—*"Of three officers."* By the codes of 1775 and 1776 it was directed that regimental, &c., courts should consist of not less than five members where that number could be conveniently assembled, otherwise of three. The present Arts. 81 and 82 provide that such courts shall consist "of three officers." *Officers* is of course identical with *commissioned* officers,[2] and—subject to the provision of Art. 78[3]—means of course officers of the *army*.

Detailing of himself by the commander. Of the three members of the court, the commander is not authorized to detail himself as one.[4] A prohibition substantially to this effect—that the commander should not act as a member—was indeed contained in the earliest Articles:[5] that the same is not repeated in the later codes is doubtless owing to the fact that the principle that the officer who constitutes the court and executes the sentence should not also assume to act as judge upon the trial is too firmly established to require to be reasserted in terms. Thus if beside the commander, there are not present in the command three other officers available for detail as members, (together with one eligible as judge advocate,) no court can be convened. The

1. DIGEST, 63.

2. Sec. 1342, Rev. Sts. That the members must also have military *rank*, and that professors (and cadets) of the Military Academy are not competent to act as members of the inferior courts, see I Opins. At. Gen. 469; II Id. 251; VI Id. 328, 330; also Chapter VII, *ante*, on the Composition of General Courts.

3. See Chapter VII, *ante*, "Regulars and Marines associated."

4. DIGEST, 64.

5. It occurs in the Articles of 1775 and 1776, in the Massachusetts Articles of '75, and in the British Articles of '65 from which they were derived. See Appendix.

ander must wait until he is supplied with the requisite er of officers, or the case be referred for trial to a general

nk of the detail. As to the rank of the members it is said that the same is not regulated by any statute. It is l recommended by some authorities[1] that the detail consist ıeral of a captain and two subalterns: in the smaller com- ; however the court must often be composed of three lieu- ts.

:isdiction—*Prohibitions as to exercise of.* Articles expressly preclude regimental and garrison courts-martial taking cognizance of *capital* offences or offences of *commis- ' officers.*[2]

apital offence, as has been remarked in a previous Chapter,[3] : only one expressly required to be visited with the death :y, but one *punishable* with death at the discretion of the An inferior court, therefore, cannot legally assume juris- n of any of the offences, however slight they may be, which ɔecified in Arts. 21 to 23, 39, 41 to 46 and 56, because the are therein made punishable "by death or such other pun- nt as a court-martial may direct."[4] But an offence made hable simply "as a court-martial may direct" is not a capi- ence for the reason that, by Art. 96, the punishment of death t legally be imposed unless expressly designated as an au- ed penalty: such an offence is therefore not within the ɔition.

:re may be distinguished a *third* class of offences which, h not capital, are not triable by inferior courts. These are

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.dye, 92; Tytler, 177; Macomb, 85.

ı the code of 1775 *officers* were expressly made subject to the juris- of a regimental court, by Arts. XVII, XIX, XXIII and XXIV, Additional Article 16. See Appendix.

hapter XVIII—"Testimony by Deposition;" Chapter XX— h."

acomb, 86; De Hart, 62, 63; Benét, 41, 42; DIGEST, 65; G. O. 852; Do. 21 of 1858; Do. 18 of 1859; Do. 9, Dept. of Utah, In Capt. Howe's Case, (G. O. 10 of 1857,) the attempting to a garrison court to assume jurisdiction of a violation of the 21st th) Article was treated as a military offence; the officer being ılly charged with and convicted of the same.

the civil crimes which, when committed by soldiers in *war*, are, by Art. 58, made exclusively punishable by "g court-martial."

Jurisdiction of the different inferior courts d guished. It is further to be noted that a "*regimental*" may adjudicate only the cases of soldiers of the specific reg or corps; the 81st Article authorizing the commander to ap courts for his own regiment or corps alone:[1] a *garrison* cou the other hand, may try enlisted men belonging to any one detachments or contingents of which the command is made

Extent of jurisdiction in general—Cognizance of g offences. Except as thus limited by the Articles, the jur tion of the inferior courts is coextensive as to all offence offenders with that of the superior court-martial. In other w a regimental or garrison court is *legally authorized* to tak nizance of all military offences of soldiers, *however grave* vided the same are not made punishable capitally, or exclu by a general court. But while inferior courts are thus empo to pass upon many cases of serious offences, their authority to *ish* is so inadequate to the proper disposition of such cases event of conviction that they should not be called upon them if it can be avoided, but the same should be reserved f action of general courts.[3] Thus a case of larceny from a soldier or officer should properly be referred to the higher And so of aggravated instances of drunkenness on duty, of ab without leave, or of other breach of military discipline.[4] But a case of more than ordinary gravity has, by competent auth been duly referred for trial to an inferior court, it cannot de

1. See Maltby, 19.

2. Except that, according to par. 913, Army Regs., "ordnance geants, commissary sergeants, and hospital stewards," may not be by regimental or garrison courts unless by special permission of th partment commander." [In this connection see Chapter III, on Regulations—"They must not legislate."]

3. DIGEST, 66–67. By the original articles of 1775 and 1776, the mental, &c., courts were in terms declared to be instituted for the and punishment of "small offences."

4. DIGEST, 66. It need hardly be added that *desertion*, though le cognizable by an inferior court in time of *peace*, (not being then a tal offence,) could only adequately be punished, and therefore pro passed upon, by a general court.

d with the trial on the mere ground that its power of
ent is not considered adequate to the offence charged.[1]
deed the offence as developed by the testimony turns out
een a considerably more serious one than the commander
bably have anticipated, the court may well suspend pro-
and report the facts to him, with the suggestion whether,
erests of discipline, the case might not preferably be dis-
by a general court.[2]

ected by Arts. 102 and 103. It has been noted in a
Chapter[3] that the provision of Art. 102, that "no person
ried a second time for the same offence," is of general
on, and precludes inferior equally with general courts
ing cognizance of cases once duly tried.
other hand it has been remarked that the jurisdiction
r courts is not restrained by the limitation of Art. 103,
g confined in terms to "general" courts. But designed
ferior courts especially are for a summary administration
, it will be of the rarest occurrence that so long a period
ars will have elapsed before a case suitable for trial by
ese tribunals is brought before it.

r of Punishment. Art. 83 declares that inferior courts
*ot have power * * * to inflict a fine exceeding one
ay, or to imprison or put to hard labor any non-commis-
icer or soldier for a longer time than one month.*"[4]
" here, measured as it is by the month's pay of the sol-
practically the same meaning as forfeiture. A fine, in
in which the word is employed in the civil procedure,
if ever adjudged by a regimental or garrison court; the
y mulct imposed under this provision of the Article be-
st invariably a forfeiture of a month's pay, or of a cer-
ber of dollars of pay of a lesser amount.
nit of the so-called "fine" or forfeiture, being thus fixed,
course legally be exceeded. Where the sentence, in
of a conviction, will probably include a forfeiture of a

EST, 67.
D'Brien, 289.
ter XVI.
"month," where used in the Articles, means
nth—see Chapter XX, *ante*.

larger amount than a month's pay, as where the accused is charge with the loss or destruction of public properly of a greater value, the case should properly be referred for trial to a general court.[1]

Should the accused be entitled to any monthly *pecuniary* allowance in addition to pay, to sentence him to forfeit his *pay and allowances* for a month would be an exceeding of the power of punishment accorded by the Article and therefore illegal.[2]

An exceeding, it may be added, of the scope of the power cannot be made good by any action of the reviewing commander. Thus, if the court has forfeited an amount greater than a month's pay, the commander cannot give effect to the sentence by disapproving, mitigating, or remitting the same as to the excess, but the sentence is wholly illegal and void.[3]

Imprisonment and hard labor. In regard to these further specified punishments,[4] it need only be repeated that the court should clearly observe the limitation as to quantity prescribed by the Article. Thus where a sentence, "to be confined till the expiration of his term of service," was adjudged by an inferior court in a case in which it did not appear from the evidence or otherwise that the term of the soldier would certainly expire within a month from its approval, it was held by the Judge Advocate General that the sentence should be disapproved unless corrected upon a reassembling of the court.[5]

The imprisonment here authorized is commonly executed by confinement in the guard-house. "Hard labor," as a distinct penalty, is now rarely adjudged by inferior courts, being mostly reserved for cases of persons sentenced by general courts to confinement in a Military Prison.

The measure of punishment in general. While a soldier may be sentenced by an inferior court *both* to forfeit a month's pay *and* be confined (or put to hard labor) for a month, the meas-

1. See De Hart, 60. But as to the "stoppage" required by Art. 17, see Chapter XXV.

2. DIGEST, 66.

3. Id. In such a case the proceedings should properly be returned to the court for a correction of the sentence.

4. That they are distinct punishments, see Chapter XX—"Confinement at hard labor."

5. DIGEST, 66.

f punishment imposed *at one trial* cannot legally exceed that ribed by Art. 83, however many or grave may be the offences ;ed and of which the accused is convicted. Upon different , however, by the same court or different courts, and by ent sentences thereby adjudged, a soldier may legally be cted to forfeitures and confinements of which the total shall derably exceed the month's limit.[1]

e provision as to punishments not exclusive. The le, in specifying that inferior courts shall inflict only a cer- quantity of three designated punishments, does not neces- exclude, and is not in practice construed as excluding, such s from imposing other punishments suitable for enlisted Thus *reduction to the ranks* may be and often is adjudged ese courts to non-commissioned officers, either as the sole lty or in addition to one or more of the penalties named in rticle. Where indeed imprisonment or hard labor is awarded ion-commissioned officer, reduction is generally and prop- mposed with it, it being deemed prejudicial to discipline n enlisted man should be subjected to a degrading punish- while still holding the office and wearing the chevrons of a ant or corporal.[3]

itary confinement, or confinement on bread and water diet,[4] also, (subject to the limitation of Art. 83, as to time,) legally id sometimes, though not often, is adjudged by inferior s. These courts have in some cases also, for petty offences, sed such corporal punishments as carrying logs, marching a loaded knapsack, &c., but this class of punishments, not recognized in par. 896 of the Army Regulations, has be- in great measure disused at least for time of peace.[5] A nce 'to be drummed out of the service,'—an ignominious of discharge,—if imposed by an inferior court, would be l,[6] general courts only being authorized, (by Art. 4,) to dis- e soldiers by sentence.

G. O. 18 of 1859; DIGEST, 66.
DIGEST, 66.
Chapter XX—"Reduction."
See pars. 896, 898, Army Regs.
See Chapter XX—"Restrictions by military usage."
G. O. 33, Dept. of the Mo., 1861.

Procedure. The procedure of a regimental or garrison court is in most respects substantially identical with that of a general court-martial.[1] The majority of the Articles of war which relate to the conduct of a military trial refer in terms to "courts-martial" without distinction and are thus applicable to the inferior equally as to the superior courts. Such, for example, are Art. 84, prescribing the oath to be taken by the members; Art. 86, providing for the punishment of contempts; Art. 88, recognizing the right of challenge; Art. 91, relating to the use in evidence of depositions; Art. 93, authorizing the granting by the court of continuances; Art. 94, fixing the hours of session; Art. 95, directing as to the order of voting by the members. As to matters not regulated by statute, the rules of the procedure and practice of general courts, as fixed by the common law of the service, are ordinarily applicable to, and to be followed by, inferior courts. Thus it is the duty of the senior member of the court to preside, preserve order, &c.; the action or judgment of the court is determined by the vote of the majority;[2] the function and authority of the judge advocate are as set forth in the Chapter treating of that official; the rights of the accused are similar to those heretofore indicated as customarily accorded him. So, the record of a regimental or garrison court is made up and authenticated in substantially the same manner and form as that of a general court,[3] and, when completed, is transmitted to the convening authority.[4] Such distinction indeed as exists between the procedure of the inferior and that of the superior court consists mainly in the fact that the former is in general simpler and more summary than the latter.

Action upon the Proceedings—*In general.* Art. 66 of the code of 1806, following in substance the earlier forms, provided that the officers convening regimental and garrison courts should "decide upon their sentences." A similar provision is

1. See O'Brien, 289; Coppée, 40.

2. In the original Article of 1775 and 1776, it is declared in express terms that regimental courts shall "give judgment," and "determine upon the sentence, by the majority of voices."

3. Par. 914, Army Regs., being expressed in general terms, governs as to the form of authentication of both kinds of courts. The statement sometimes made, (see Coppée, 42,) that the members *all* sign, is not correct.

4. According to the general rule laid down in par. 918.

:mbraced in the present Arts. 81 and 82, but in Art. 104 it clared—generally—that "no sentence of a court-martial shall ırried into execution" until the approval of the proceedings the officer ordering the court," (or "the officer command- 'or the time being;"[1]) and in Art. 109—also generally—that sentences of a court-martial may be confirmed and carried execution" by such officer, &c. The proceedings and sen- :s, therefore, of the courts authorized by Arts. 81 and 82 o be reviewed and acted upon by the commanders indicated :in respectively. The principles set forth in Chapter XXI, ›verning the subject of the authority, discretion, and duty of Reviewing Officer, will apply in general to the action of these nanders.

rm of action. Par. 918 of the Army Regulations, refer- to courts-martial in general, declares that the reviewing :r "shall state at the end of the proceedings in each case his ;ion and orders therein."[2] The form of this action, as sub- ed in or upon the proceedings of an inferior court, is sub- :ially the same as that adopted in expressing the action taken ı a case tried by a general court, only that it is usually briefer simpler. Some commanders, in approving the sentence, con- themselves with writing and subscribing the single word proved," at the end of the record.

ıwer to return proceedings for correction. As in the ınce of a case tried by a general court-martial, the convening ority, (or his successor in command,) is empowered to return proceedings to the court, (reassembling it if necessary,) for ion and the correction of errors.[3]

ıwer of pardon and mitigation. Art. 112, in empower- ›fficers authorized to act upon the sentences of *general* courts

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As to the meaning of this term, and the construction, generally, of 104 and 109, see Chapter XXI.

In Lt. Col. Robertson's case, one of the offences with which the ed was charged, and of which he was convicted, was—"permitting nces of regimental courts to be carried into execution, without affix- is approval to the proceedings of the same." James, 828; Sim- § 718.

Par. 923, Army Regs., is expressed in general terms, thus embrac- 7 courts-martial. See this subject as treated in Chapter XXI.

to remit, &c., the same, adds:—"*Every officer commanding a* [illegible] *ment or garrison in which a regimental or garrison court-m*[illegible] *may be held, shall have power to pardon or mitigate any p*[illegible] *ment which such court may adjudge.*"[1] What has been [illegible] therefore, in regard to the nature and extent of this po[illegible] Chapter XXI will in general apply here. It may be repeated that, in the opinion of the author, power is given by this Article, not only for the pardon or mitigation of a punishment or punishments by the officer in command at the time of and in connection with the original action and approval, but also for the pardon or remission of the same by such officer or his successor, at any time thereafter before the sentence is fully executed. The beneficial nature of the provision justifies a liberal construction, and the practice has sustained this interpretation.

Promulgation. The proceedings, in our practice, are published by the commanding officer of the regiment, garrison, &c., to the command, in a regimental or post, &c., general order, the form of which follows in substance that of the General Order by which the proceedings of the superior courts are commonly promulgated.

Action not subject to supervision. Arts. 109 and 112 vest, as has been seen, in regimental and garrison commanders the power to confirm and execute, as well as pardon or mitigate, the sentences of the courts ordered by them under Arts. 81 and 82. Upon a familiar principle of interpretation this power is to be regarded as *exclusive:* no superior authority, therefore, can legally reverse or revise their action. The Army Regulations, indeed, of 1863, contained two paragraphs, (numbered 898 and 899,) which declared that such commanders should transmit the proceedings of these courts to the department headquarters "for the supervision of the department commander," and, again, that the latter might in certain cases "suspend" the execution of the sentence. Par. 899, however, which contained the latter provision, was held by Judge Advocate General Holt to be void and inoperative because in conflict with the Articles of war, and this opinion was publicly concurred in by the Secretary of War.[2] In the later authorized edition of the Regulations, that of 1880, not only was

1. See par. 924, Army Regs.
2. In G. O. 72 of 1873.

·99, but also par. 898 of 1863, wholly omitted; the last ap-
.tly as being subject to the same legal objection as the other.
e opinion of the author, the latter regulation was as prop-
required to be omitted as the former. An army regulation
ferior in force to an Act of Congress, and such an Act having
ed in regimental, &c., commanders the exclusive power to
ly act upon and fully execute the sentences of inferior courts,
r action cannot, by an army regulation, be made subject to
revision of superior or other authority. Par. 898 of 1863 was
an illegal assumption and of no effect, and has properly been
doned.[1] Thus, at military law, the action of the commanders
orized to pass upon the proceedings and sentences of the in-
r courts is as exclusive and final as is the action of the class
ommanders authorized to pass upon the proceedings and
nces of general courts-martial.

sposition of Records. Par. 918 of the Army Regulations
res, generally, that—"the judge advocate shall transmit the
edings without delay to the officer having authority to con-
the sentence." A provision of the Act of March 3, 1877,
ts that all records of inferior courts shall, "*after having
acted upon, be retained and filed in the judge advocate's
at the headquarters of the department commander in whose
tment the courts were held, for two years, at the end of*

An opposite opinion was given in March, 1882, by Judge Advocate
al Swaim, which the Secretary of War is understood to have form-
pproved, but which was never published in General Orders. The
r named took the view that the paragraph, (898 of 1863,) was "inad-
itly omitted" from the Regulations of 1880, and was to be regarded
l in force; further that the right of the department commander to
vise the proceedings of inferior courts was recognized by the provis-
the Act of March 3, 1877, (see text, *post*,) relating to the disposition
records of inferior courts. The author does not perceive this
nition and is unable to concur in this opinion. It has, however,
acted upon in a few cases by department commanders. See G. C.
22, Dept. of the Columbia, 1882.

paragraph in question was construed by Judge Advocate General
, *prior to* the publication of the Regulations of 1880, as follows:—
ler par. 898 it devolves upon a department commander to supervise
oceedings of regimental and garrison courts-martial transmitted to
adquarters, and if he discovers any material error, defect, or omis-
a record, or in the action taken in the case by the inferior com-
r, to return the proceedings to the latter; calling his attention to
rrection deemed proper to be made." DIGEST, 64. Any fi-
ity could, it is believed, legally be given only by *leg*

which time they may be destroyed." This provision was enacted in view of the fact that the Bureau of Military Justice had become gradually burthened with a vast mass of such records the accumulation of which it was desirable to discontinue. Under this Act, regimental and garrison commanders, after having finally acted upon the proceedings and sentences of the courts ordered by them, transmit the records to department headquarters to be disposed of as prescribed.

II. THE FIELD OFFICER'S COURT.

Its Nature in General. This is a distinct species of tribunal from the Regimental or Garrison Court, differing from the latter mainly in that (1) it is authorized only for time of war, and (2) that its sentences are not executed by the simple order of the convening officer but require, to give them effect, the approval of a higher commander. As will be seen, however, it is assimilated to the Regimental Court authorized by Art. 81, being itself a simple form of regimental court provided for periods when a summary disposition of cases of minor offenders is especially called for.[1]

The Law on the Subject. This special agency for the administration of military justice was inaugurated during the last war by the Act of July 17, 1862, c. 201, s. 7. The provisions of this statute were incorporated in the code of Articles of 1874, and the existing law relating to this court is contained in Arts. 80, 83 and 110, as follows:—

"ART. 80. *In time of war a field officer may be detailed in each regiment, to try soldiers thereof for offences not capital; and no soldier, serving with his regiment, shall be tried by a regimental*

1. Except as to the formality required for the execution of its sentences, this court resembles the "Drum Head," or "Field Court-Martial," formerly known in the English practice. As to the existence of procedure of this summary tribunal, which was held, without regard the usual forms, in "cases supposed to require an immediate examp see reference in Adye, 97; Mil. Law of Eng., 56; Simmons § 251; Ho 235; Id., (P.) 554, 683, 686–7, 797–9; D'Aguilar, 77; Gov. Wall's C 28 How. St. T., 151; Picton's Case, 41 Hansard's Debates, (3) 1 1273. That a resort to a Drum Head Court was considered to be p missible only in an emergency, as during war or on the occasion mutiny, see case of Col. Allan, convicted of the offence of empl such a court in cases not justifying it. Hansard, N. S., vol. VIII, p Debate in Ho. of Com., 1823.

rrison court-martial when a field officer of his regiment may be detailed.

"ART. 83. * * * * * * *Field officers detailed to try offenders ll not have power to try capital cases or commissioned officers, or nflict a fine exceeding one month's pay, or to imprison or put to rd labor any non-commissioned officer or soldier for a longer time n one month.*

'ART. 110. *No sentence of a field officer, detailed to try soldiers his regiment, shall be carried into execution, until the whole protings shall have been approved by the brigade commander, or, ase there be no brigade commander, by the commanding officer he post.*"

Art. 83, which applies alike to all inferior courts, has been fully sidered in the first part of this Chapter, in treating of the isdiction and Power of punishment of Regimental and Garon Courts.

Constitution of the Court. The Articles are silent as to officer by whom the Field Officer may be detailed as a court. llowing, however, the analogy between this and the Regntal Court, it would seem clear, as held by Judge Advocate neral Holt,[1] that it was intended that the regimental comnder should make the detail where practicable; *i. e.* where re is, besides himself, at least one other field officer of the regnt present and serving with it.[2] In the absence of such an cer, the court, (the regimental commander not being authorl to detail himself,[3]) must, if detailed at all, be detailed by erior authority; and it may be inferred, from the provision Art. 110 in regard to the taking of action upon the sentence the brigade (or post) commander, that such commander would under the circumstances indicated, the proper authority to ke the detail.[4] Upon this point the law is incomplete. *In ctice*, Field Officers' Courts, where resorted to, have comly been detailed by commanders of regiments. Where it been impracticable to convene them on account of the want

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1 DIGEST, 61–2.

2 Id., 61.

3 Id., 62.

4 In some instances during the late war, *department* commanders iled these courts, or ordered them to be detailed. See G. O. 24, t. of the Cumberland, 1862; Coppée, 43.

of material, or where, because the regiment was not embr in a brigade or post command and its sentence could not th fore be executed, it would have been futile to have done so, ordinary regimental or garrison court, or a general court, been convened instead; and, in convening the former court, order, in view of the concluding provision of Art. 80, has usu specified in terms that it was 'impracticable to detail a F Officer.'

It is evident that an officer having a command which is than a regiment, or which though greater does not embra regiment, is not empowered to detail a Field Officer u Art. 80.[1]

Composition. The court must consist either of a colo lieutenant-colonel, or major, or of an officer who, though of a li rank inferior to major, has the brevet rank of a field officer has been duly assigned to duty according to his brevet r Such assignments, however, are rarely if ever made in regim and, in practice, the, (or a,) *major* of the regiment has comm been detailed for the court. A captain, who is merely *acti* major, cannot legally be so detailed.

Further, from the terms of Arts. 80 and 110, it is clear that Field Officer must be a *regimental* officer and an officer of regiment to which the parties tried belong, and that a *staff* o is not eligible for the detail.[2]

Jurisdiction. As has been remarked, the jurisdiction of Field Officer is restricted to time of war. He cannot there legally be detailed under Art. 80 in time of peace. As to persons within his jurisdiction, these, as indicated by the Art are the enlisted men of the regiment in and for which h detailed as a court. The regiment is the exclusive field o jurisdiction and its limit. While he may try soldiers of the ferent companies of the regiment though serving at sep stations, &c., provided they are all under the command of regimental commander, he may not try members of the regi who are *detached* from it and serving with other and distinct mands.[3] In brief, both as to offenders and offences, his juri

1. See DIGEST, 62.
2. Idem.
3. Idem

n is identical with that, heretofore defined in this Chapter, the Regimental Court of three officers authorized by Art. 81.[1]

Power of Punishment. The authority also of the Field icer to award punishment upon conviction is made, by Art. 83, e same as that vested in the other inferior courts and already sidered in this Chapter.

Procedure—*No oath required.* Neither the 84th[2] nor other icle of the code requires that the Field Officer shall be spe-lly sworn as a court, and in practice he has never been sworn uch.

o judge advocate detailed. Under the general authority Art. 74, a judge advocate may probably be as legally detailed ttend a Field Officer's as a regimental or garrison court.[3] In tice, however, no judge advocate or recorder has ever been etailed. The Field Officer himself performs the whole duty e court—conducts the investigation and keeps the record.[4]

he form of the record. The original Act of 1862 ex-ly provided that the Field Officer "*shall make a record of roceedings*," and Art. 110 declares that no sentence adjudged Field Officer "*shall be carried into execution until the whole eedings shall have been approved by the brigade commander*," The term "whole proceedings," like the same term as em-ed in Art. 104, is construed as meaning *material* proceedings, proceedings material and sufficient to sustain and validate entence.[5] As to the record of proceedings to be made by the d Officer, this, in view of the summary nature of his action, only be, and has in practice been, of a brief and simple cter. Unlike the records of other inferior, or of general, s, his record does not ordinarily set forth the testimony,

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DIGEST, 62, 65.

The "regimental" court referred to in this article is evidently the gimental court of three officers, of Art. 81; the only one in existence the original of Art. 84 was enacted.

As to the detailing of judge advocates for regimental and garrison , see this Chapter *ante;* also G. O. 15 of 1880.

DIGEST, 62.

As to the construction of these words in Art. 104, see Chapter XXI, "Approval."

when any is taken, nor does it contain any reference to the ing to the accused of an opportunity for challenge, th Officer not being liable to challenge.[1] In other respects t ord will properly follow the essential features of the rec other courts, setting forth such particulars as are requisite hibit the authority and the action of the Officer. It wi properly recite the order of detail, the names, &c., of the off tried, their offences as charged and their pleas, the findi the court and the punishments adjudged upon convictio whole being authenticated by the Officer's signature.[2]

Action upon the Proceedings. Art. 110, in making sential to the legal execution of the sentence that the proce shall first be approved by the brigade, (or, if there be no post,) commander, is construed, upon the familiar princi *expressio unius exclusio alterius*, as confining the authority proval to the particular commanders named,—excluding from, for example, a division or department commander.[3] W therefore, a regiment is a part neither of a brigade nor a command, it will, as already remarked, be quite useless fo regimental commander to detail a field officer as a court, sin punishment adjudged by him can take effect: some other will therefore properly be resorted to.

The Article requiring that the proceedings and sentence, operative, shall be approved by the brigade (or post) comma it follows that where he *disapproves* the proceedings, the s as in the case of the proceedings of a general court,[4] are ren nugatory[5] and no punishment can be enforced. Where the ceedings are *approved* by such commander, the execution o sentence will in general properly be devolved upon the regim commander.

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1. DIGEST, 63, 70. And see Chapter XIV.

2. DIGEST, 62, 63.

3. Proceedings of Field Officers' Courts have indeed been publis acted upon and approved by department (and district) command sundry General Orders, of which the greater number were G. O. First Military District, of 1868–9. This was, however, before the lication of the Articles of 1874, in which the law on the subject action upon the proceedings of these courts is more succinctly exp than in the Act of 1862.

4. Chapter XXI, *ante*—"Disapproval."

5. Except of course that they may be pleaded as a "former See Chapter XVI, *ante*.

Pardon and Mitigation. The present Articles of war—in rt. 112 or elsewhere—fail to authorize the convening officer or her military commander, or the Field Officer, to pardon or mitgate punishments awarded by the latter.[1]

MILITARY BOARDS.

Beside the boards of examination, inspection, investigation, tc.,[2] convened from time to time by the President or military uperiors in the exercise of their commands, and not calling for pecial notice in this treatise, there are two more important spe-ies of boards, one authorized by statute and one by army regu-tion, of which brief mention should here be made. These are etiring Boards and Boards of Survey.

RETIRING BOARDS.

The law on the subject. These are the boards constituted nd empowered, and whose duties are prescribed, under and by ctions 1246 to 1253 of the Revised Statutes.[3] These statutes ovide—that the Secretary of War, under the direction of the esident, shall, from time to time, assemble such boards, of from e to nine officers, two fifths of whom shall be medical officers; e members other than medical to be, "as far as may be, *seniors rank* to the officer whose disability is inquired of;"—that he members of the board shall be *sworn* in every case to dis-arge their duties honestly and impartially;"—that the board,

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1. The "regimental" court referred to in Art. 112 is evidently the urt, commonly designated by that title, authorized by Art. 81. See te *ante*, as to the "regimental" court referred to in Art. 84.

2. As, for example, the boards authorized or recognized in the Rev. t., Secs. 1160, 1172, 1196, 1206, 1208, 1214, 1325, (Academic Board the Military Academy,) 1327, (Board of Visitors to the Academy,) 15. (Board of Commissioners of the Military Prison;) and in the Acts June 23, 1874, June 18, 1878, &c.; also the Board of Engineers pro-ed for by par. 2478, Army Regs., and the board of inspection of re-its, (par. 821.) With these also are to be classed the Post and Regi-ntal Councils of Administration, (Art. XLI, A. R.) As to these last Kautz, Customs of the Service, 158–169.

3. Similar provisions as to *naval* retiring boards are contained in s. 1448 to 1453, Rev. Sts.

It may be noted that retirement on account of *age* or *duration of serv-is* a proceeding wholly distinct from retirement for disability as as-tained by a board: for the former no inquiry is necessary other than ference to the officer's military record.

for the purposes of the investigation of the matter of the ability and incapacity of officers, "shall have such *powers* o court-martial and of a court of inquiry as may be necessary;' that the board shall *find* upon the questions of the incapacity: active service of the officer, the cause of his incapacity, a whether or not such cause was an incident of the service;—th the *approval* of the President shall be necessary to give effect the finding of the board;—that the President, in approving, sha *retire* the officer *from active service* merely, (if found to hav been incapacitated by an incident of the service,) or, (if not s found,) may, in his discretion, "*wholly retire*" him, *i. e.* dro him from the army;[1]—that no officer whose case is inquired int by a retiring board shall be retired "without a *full and fai hearing*" before the board, if he demand it."

Composition. The provision, above cited, of Sec. 1246, tha the members, other than medical, "shall, as far as may be," b "seniors in rank to the officer whose disability is inquired of," analogous to the provision of the 75th Article of war in regard t the rank of the members of a court-martial, and is to be similar construed.[2] As in that case it is to be considered that the statu is directory only upon the convening authority; that it is for him to determine the matter of the rank of the members; and tha his detail of officers for the board, as shown by his order, is con clusive evidence that, so far as the interests and exigencies of th service have permitted, seniors in rank have been selected.

Swearing of members. The statute,—Sec. 1247,—thoug requiring that the members shall be sworn, does not specify ho or by whom. No provision is made for a judge advocate or r corder, nor is the senior or the junior member empowered t qualify the others. *In practice*, however, a recorder is detail with the board; and, inasmuch as, by Sec. 1248, the board is i vested with the "powers" of a military court, the swearing is i general proceeded with as indicated in the 117th Article of wa Following, however, the terms of Sec. 1247, the members ne but to be simply sworn "to discharge their duties honestly a impartially."

1. As to the effect of "wholly retiring," as a form of summary di missal, see *post*, Chapter XXV—"Ninety-Ninth Article."

2. See Chapter VII—"Composition of General Courts-Martial."

owers. The provision that the board "shall have such ers of a court-martial and of a court of inquiry as may be ssary," &c., is indefinite, but has given rise to but little ques- in practice. Construing it in connection with the other pro- ons cited, its evident intention is seen to be that the board l have and exercise such powers of a "court" as may be isite to insure a full investigation, to afford a fair hearing, to enable it satisfactorily to determine the questions referred. s it is properly authorized and empowered to call for and rtain such testimony of witnesses, depositions, documents or rs, as may be material to establish or illustrate the nature or nt of the disability,[1] to pass upon questions of admissibility vidence, to grant continuances, to give the officer ordered re it a reasonable opportunity of defence if desired, to find report in his absence if he fail to appear; and further to rmine the relevancy and validity of challenges to its mem- and punish acts in the nature of contempt, according to Arts. nd 88, if necessary to an impartial and complete inquiry. But board cannot entertain a charge of a military offence as such, assume to *try*.[2] If the case be one calling for trial and pun- ment, it should be referred to a court-martial.[3]

he hearing. In view of the provision of Sec. 1253, in re- to the "full and fair hearing" to be afforded, the board will erly give every officer ordered before it such a hearing if he e one,[4]—allowing him to introduce all reasonably material ence as to the causes and circumstances of the alleged disa- y and his acts and record in the service, to cross-examine esses and interpose objections to testimony offered on the part e military authorities, to be assisted by counsel, and to make

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"The investigation is not affected by any limitation of time, as is of a court-martial—viz. by Art. 103." DIGEST, 431.

See DIGEST, 431.

Compare Sec. 1450, Rev. Sts., as to the *Navy*.

In a case of an officer of the *navy*, retired upon the report of a , before which, without fault on his part, he had not been afforded aring to which he was entitled by Sec. 1455, Rev. Sts., it was held Attorney General, (XVI Opins., 20,) that—the vacancy in his on the active list not having been filled—the President was au- ed to revoke the order of retirement in order that the officer might he opportunity to be duly heard before his case was finally dis- of. But compare Miller *v.* U. S., 19 Ct. Cl. 339.

argument or statement. There will, rarely, however, be an before a retiring board where the officer is ordered before it his own application; otherwise perhaps where the proceedi *in invitum.* In the latter case, if upon due notice the office to appear, he will be held to have waived his right to a "heari

The finding. Though Sec. 1250 refers to this as the "*de* of the board," and Sec. 1248 authorizes the board to "*dete* the facts," it is clear, from these sections and Sec. 1249, th finding is but in the nature of a recommendation, without or effect unless approved by the President and acted upon b accordingly.[2]

Action. The action of the President is prescribed by 1251 and 1252, as above indicated. In any case in which, judgment, the investigation has not been complete, or the fi is not justified by the facts, he may return the proceedings board for a further inquiry or hearing, or a correction of it clusions, as in a case of a court-martial. But not being a the board, upon a reconsideration, may, and should if so dire re-examine former witnesses or take new testimony.

BOARDS OF SURVEY.

These are boards of officers, "not to exceed three,"[3] autho by the Army Regulations to be convened by commanding offi for the purpose of investigating the cause and fixing the res sibility in cases of deficiency or damage of public property nished for military use; of verifying discrepancies, if any, w such property is transferred from one officer to another; of r ing inventories of such property when required to be abandc or when the officer in charge has deceased, and for other purp indicated in the Regulations.[4]

The regulations on the subject are contained in Title LXX the Army Regulations of 1880. These regulations are so fu to call for but little comment.

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1. And he "cannot properly take exception to a conclusion ar at in his absence." DIGEST, 432.

2. DIGEST, 431. As to the effect of the findings *per se*, see Bur *v.* U. S., 19 Ct. Cl. 138; XVI Opins. At. Gen., 104.

3. Their *composition* is further regulated in par. 1397.

4. See pars. 1400, 1402.

Province and duty in general. The main object and use of board of survey is to decide whether a certain officer, soldier or her person, shall be charged with the amount of a particular loss deficiency, or relieved from liability therefor;[1] or to determine a estion of responsibility for property as between two or more icers, soldiers, or other persons. While such a board is not a urt and cannot try, convict, or acquit,[2] it may, like a court of quiry, report facts and conclusions which will properly form the sis for a military charge or a civil prosecution. It is impor-nt, therefore, that it should investigate,[3] as thoroughly as its want power to swear witnesses will permit,[4] and report, the full tes-mony bearing upon the question at issue. Thus where public res received at a military station are found to be deficient or naged, the board of survey, (which should be convened with-t delay,) should make so extended and complete an investi-ion as that it shall, if practicable, satisfactorily be made to pear from its report what party,—whether original sender, inter-diate forwarding officer, contractor for supplies or transporta-n, common carrier or other agent, or consignee or actual re-ver,—is the person really accountable for the loss, damage, demurrage.[5] To facilitate the solution of the question, the ard should annex to their report all material bills of lading, voices, and receipts, specify the routes and modes of transpor-ion, state the names and marks on the packages, &c.[6] If the

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1. See par. 1401, 1405, A. R.

2. DIGEST, 125.

3. See par. 1401, A. R.

4. The ruling of the Judge Advocate General, that boards of survey not empowered to swear either themselves or witnesses, as published G. O. 68 of 1873, is now incorporated in the Regulations, par. 1398.

5. Circ. 6, Dept. of Texas, 1865; G. O. 15, Id., 1871; G. O. 32, 52, pt. of Dakota, 1867; Do. 12, Id., 1870; Do. 87, Id., 1873.

A *contractor* cannot be *bound*, without his consent, by the report of a ard of survey. See Heathfield *v.* U. S., 8 Ct. Cl. 213. Otherwise ere he has stipulated in the contract to be so bound. And in such e, the report, if not objected to by the contractor when a copy is fur-ned him, will subsequently be supported as sufficient by the courts, ugh it merely consist of a conclusion without statement of evidence easons. U. S. *v.* Shrewsbury, 23 Wallace, 508.

6. Circ. 6, Dept. of Texas, 1865; G. O. 24, Div. of the Pacific, 1866. n addition to the Orders above cited, see further—as containing in-ctions, &c., in regard to these boards—G. O. 33, Dept. of the Co-bia, 1868; Do. 21, Dept. of Texas, 1875; Circ. 2, Fifth Mil. Dis-

loss was the fault of no person, but was incurred through the violence of the elements or the operations incident to a state of war, this fact should be made fully to appear.

The hearing. Where the investigation involves an inquiry into the acts or proceedings of a particular officer or soldier, or a question of his accountability, he should be allowed to appear before the board and be fully heard in defence or explanation. While the board may receive in evidence affidavits where no better form of evidence is attainable, its investigation should, if practicable, be in no respect *ex parte;*[1] the person or persons interested being afforded a reasonable opportunity to file counter affidavits or introduce oral or written evidence.

Action. As indicated in par. 1406 of the Regulations, the report of the board, to become the basis of official action, should receive the *approval* of the convening authority. That officer will also properly endorse upon, or state in connection with, the report, what action he may himself have taken in the case.[2] Thus it is specifically directed in several of the General Orders that he should cause carriers or contractors to be charged with the money value of property for which they are found by the board to be accountable, on the bills of lading before they are signed.[3]

Par. 1406 further prescribes that the approval or action of the convening authority shall be "subject to revision by higher authority." Thus General Order 101 of the War Department, of 1875, declares that the proceedings of boards of survey "will not be regarded as complete and sufficient vouchers for the settlement of officers' accounts until revised by the Department Commander."[4] Later orders, however, of 1879 and 1880, incorporated in pars. 1411 and 1412, require that the proceedings, to constitute complete vouchers, must be accepted by the Secretary of War.

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trict, 1868; Circ., Dept. of Cal., Mch. 20, 1872; Do., Id., Jan. 2, 1873; Kautz, Customs of the Service, 131–140.

1. DIGEST, 125.

2. G. O. 12, Dept. of Cal., 1869.

3. G. O. 12, Dept. of Dakota, 1870; Do. 12, Dept. of Cal., 1869. In the last Order it is said—"A failure to do so will throw the responsibility on the officer who may have signed the bill of lading without having first called for the board of survey, to examine into losses and fix responsibility thereof."

4. As to further action by the Department Commander, see pars. 1407 and 1408, A. R.

CHAPTER XXIII.

THE RECORD.

ıw Relating to the Subject. Though courts-martial *urts of record* in any such sense as that in which the mployed in the civil practice,[1] it is yet the uniform ɔur service for all such courts, whether general or in- make and render formal records of the proceedings of ried by them. They are not in terms required by any keep records, but that they will properly do so is clearly ıted by the code in Arts. 104, 110, 111, 113, and 114,[3] ɜr to the approving, forwarding, and preserving and fur- ɔpies, of the "proceedings" of military courts,—by Sec. . Sts., which makes it the duty of the Judge Advocate o receive, &c., such "proceedings,"—by Sec. 1203, which requires that the "reporter," thereby authorized ɔinted, "shall record" such proceedings,—and by the ırch 3, 1877, which provides for the disposition of the " of inferior courts.

my Regulations indeed are more explicit in their refer- he record. Par. 914 directs that—"Every court-mar- ɜeep a complete and accurate record of its proceedings," goes on to indicate certain particulars which "the rec- show." Par. 915 directs that the record "shall be d legibly written," &c. Par. 917 directs as to the form "the record of the proceedings" shall be "endorsed," ;. 918 and 919 direct as to the transmittal of the "pro-

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ıbers *v.* Jennings, 7 Mod. 125; *Ex parte* Watkins, 3 Peters, ɔn *v.* John, 2 Binney, 215; Ricketts *v.* Walker, Sup. Ct., Cal- ɜh 31, 1841; Hough, (P.) 718.

the records of Field Officers' Courts which are less formal than her courts, see Chapter XXII.

ıare Arts. 120, 121, as to the "proceedings" of Courts of

ceedings" to the proper official. Par. 923 refers to the revision and correction of the "record."

The custom of the service, however, to a much greater extent than regulation, must be the guide as to the form and substance of the statements and recitals in a record of a court-martial.

General Duty of the Court as to the Record. The record is the act and record of the *court*, not of the judge advocate. The latter is, here, but the ministerial officer who notes the proceedings under the court's direction.[1] The record is not the history of a prosecution, but of an impartial investigation conducted by a body of officers in pursuance of the order of a competent superior and of an oath which requires them to conduct it faithfully. It is thus the court that makes the record and is responsible for it;[2] its responsibility consisting in the rendering of a full and accurate report of the facts and law developed on the hearing, completed by a final judgment in due form.[3]

Fundamental Rules for the making up of the Record. Two general rules properly governing the framing of the record may be specified at the outset, namely:—

1. The record must fully set forth all the proceedings had in the particular case. Thus it must include the original assembling under the Order or Orders convening and composing the court; the preliminary challenging, if any, and the action thereupon; the organization for the trial; the appoint-

1. See Chapter XIII; DIGEST, 300.

2. DIGEST, 421.

3. See G. O. 3, Dept. of the Pacific, 1863; Do. 23, Dept. of the South, 1870. Courts-martial, (with their judge advocates,) have been not unfrequently censured in G. O., on account of material omissions and other errors appearing in their records. See, for example, G. O. 23, Dept. of the Mo., 1861; Do. 120, Id., 1867; Do. 23, Army of the Potomac, 1863; Do. 62, 76, Dept. of the Gulf, 1863; Do. 54, Dept. of the South, 1863; Do. 25, 38, 41, Northern Dept., 1864; Do. 16, Id., 1865; Do. 49, Dept. of the Susquehanna, 1864; Do. 10, Dept. of Pa., 1865; Do. 37, Middle Mil. Dept., 1865; Do. 41, Dept. of Fla., 1865; Do. 25, Dept. of So. Ca., 1866; Do. 54, Dept. of Dak., 1867; Do. 25, Id., 1868; Do. 5, Dept. of La., 1868; Do. 4, Dept. of the Lakes, 1867; Do. 5, Id., 1868; Do. 14, Dept. of Texas, 1876; G. C. M. O. 2, Dept. of Arizona, 1883; Do. 31, Dept. of the Mo., 1885.

In general, however, the commander should first, where practicable, afford the court an opportunity to correct its errors, by the return of the record for *revision*. See Chapter XXI.

ıt of reporter or employment of clerk, if any, and introduction ounsel; the arraignment and pleas, with special pleas, if any, disposition of same; the sworn testimony and written evi- ce, with the objections to its admission and rulings thereon; closing arguments or statements; the findings and sentence; ther with all motions, adjournments, continuances, proceed- for contempt if any,[1] proceedings upon revision if any, &c.; hort every material act, proposition, or occurrence, essential erfect the history of the investigation as such, and to advise reviewing authority as to all the questions of fact and law lved in the case.[2] The only acts of the court or members properly embraced in the minutes are the discussions, votes, had or given in secret session where the court is closed for beration upon its judgment or some interlocutory question. ı discussions are no part of the formal record;[3] and, as to the s and opinions of members, the stating of these is precluded Arts. 84 and 85. It is in fact only the *result* of a deliberation ecret session that is to be entered upon the record.

. ***Each record must be an entirety.*** In other words, when ral cases are tried by the same court, each and every record t be entire and perfect within itself; *i. e.* both in form and stance wholly distinct and separate from the record of every r case. Each record must be an original official document, shed and complete in all its details, with no particular left to supplied by a reference to any previous or other record or er, and as single and individual as if it were the record of the case tried by the court.[4] This rule is illustrated by par. 888 he Regulations, which directs that "the proceedings in each will be made up separately;" that is to say that the records he different cases tried shall not be consolidated or attached

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As to the form of the record of proceedings had for contempt, see pter XVII.

See DIGEST, 413; G. O. 11, Dept. of the Platte, 1868; Do. 51, Id., ı; Do. 8, First Mil. Dist., 1868; Do. 3, Dept. of the Pacific, 1863.

O'Brien, 283.

See G. O. 292 of 1863; Do. 2, Dept. of the Pacific, 1863; Do. 12, t. of the Gulf, 1866; Do. 120, Dept. of the Mo., 1867; Do. 5, 21, Fifth Dist., 1868; Do. 176, Id., 1869; Do. 7, Dept. of the South, 1869; 74, Dept. of Dakota, 1869; Do. 29, Dept. of the Pl[illegible] 1871; DIGEST, 413.

together as parts of a continuous report of the court, but prepared and transmitted as successive and independent communications.[1]

Details of the Record. Premising with the remark that the record, as indeed directed by the Army Regulations,[2] should be legibly and neatly written, we proceed to indicate the form and manner of exhibiting the several details of the same in their order.

Prefixing of copies of Orders. The original Order convening the court, constituting as it does the initial authority for its existence and action, and the foundation for all the subsequent proceedings, is the logical starting point of the record, which should therefore properly be prefaced by a copy of the same. Par. 914 of the Regulations directs that a copy be entered on the record in each case. It is not *necessary* indeed that it be prefixed, since it may be appended at the end; the best, however, and now uniform practice is to prefix it. In addition to specifying the detail of members, time and place of assembling, &c., it should show, by its heading and subscription, by what commander,—whether Commander-in-chief, general of the Army, commander of a separate army, department, division, separate brigade, regiment, garrison, &c.,—it has been issued, thus testing at the outset the legality of the entire proceedings.

If, as is the more usual course, a series of cases are brought to trial before the court, a separate copy of the convening Order is to be prefixed to the record of each case. Merely to prefix a copy to the record of the first case tried is to render each record after the first incomplete, thus disregarding the above-stated general rule—that each record should be complete and perfect of itself.

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1. DIGEST, 413. And compare VIII Opins. At. Gen., 336, 340.

2. Par. 915 prescribes—"The record shall be clearly and legibly written, as far as practicable, without erasures or interlineations." Imperfect legibility is noticed as a defect in G. O. 23, Army of the Potomac, 1863; Do. 3, Dept. of the Pacific, 1863; G. C. M. O. 5, 6, Dept. of the Mo., 1875. Erasures and interlineations occurring in records are animadverted upon in the two first of these G. O.; also in Do. 76, Dept. of the Gulf, 1863.

Though the regulation contemplates that the record will be written there is no legal objection to *printing* it in whole or in part, except course the signatures of the president and judge advocate. Such p ing, however, has not in general been found to be advantageous in pr

here, subsequently to the issue of the original Order, there ssued supplementary Orders relieving or adding members, ling a new judge advocate, changing the place or time of on, or otherwise modifying the first Order, copies of all such rs should in general be prefixed, in the proper succession, ch record made up after their dates, not only as belonging e history of the proceedings, but as indicating perhaps the ority for the appearing and acting of a member or members e judge advocate, which otherwise would not be exhibited ne face of the record.[1] In this class of Orders are included e in the form of telegrams:[2] copies of these, where affecting *personnel* of the court, &c., should be prefixed until Orders more formal character be substituted therefor. Where, pend- a session of the court, a new Order or telegram of the class er consideration is communicated to the court, the same should perly be entered in the body of the proceedings, at the point which it was received, and prefixed to the subsequent records trials by the same court. Where an Order ceases to have e,—as where it is wholly superseded by a subsequent Order,— may be omitted from further records. If any considerable ber of Orders modifying the original detail, &c., have been ed, and are properly required to be prefixed to each record, it be found convenient to have them *printed.*

atement of original assembling of the court. The rd of the actual proceedings of the court begins with a state- t of the first assembling of members at the proper place and in accordance with the terms of the convening Order. If full detail makes its appearance, a statement in the record *all the members were present* will be legally sufficient: the rable form, however, is to specify the several members by e, in the order of their rank, with their official designations. atement to the effect that *the same members* were present as previous trial by the same court is irregular and insufficient, ontravening the fundamental rule that the proceedings of

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In Circular, No. 12, Hdqrs. of Army, of 1883, "the use of a -writer' in writing out *sentences* of courts-martial is disapproved."

In G. O. 3 and 7, Dept. of the Mo., 1863, the proceedings were proved as incomplete on account of the omission of copies of such rs.

See G. O. 3, Dept. of the Mo., 1863.

each case should be complete *in se* and not required to be mented from the record of any other case.[1]

If less than five members attend on the first day, those should, regularly, be specified by name, and then those with a mention of the reason for the absence of any me members if known: if not known, the form generally ad 'Cause of absence unknown.'[2] To this should follow th ment that, no quorum being present, the members thereu journed.

The presence of the judge advocate and of the acc present in fact, should also be specified. If absent, the c absence should be stated when known. If an adjourn taken on account of the absence of either, it should be sc If the judge advocate is not present at the first assembl senior member will properly retain a memorandum of th to be furnished the judge advocate for incorporation i formal record.

Statement of subsequent assemblings. The state the assembling of the court on the second and subsequer of a trial should be headed with the proper place and da should recite that the court met pursuant to adjournment, the members present as in the record of the original sessic state—where such is the fact—that 'the same members we ent as yesterday,' or 'as at the last session,' is a form som adopted but not to be favored: it is always better to spec

1. So, statements simply to the effect that "the Court b session," after a certain completed trial, "proceeded to the tr &c.; or that "the Court met pursuant to adjournment," from vious trial—without adding who were present; are faulty as not sh without a reference to some other distinct proceeding, what and ho members attended at the particular trial. See G. O. 292 of 186 64, Dept. of Ark., 1865; Do. 120, Dept. of the Mo., 1867; Do. 51 of the Platte, 1871.

2. See G. O. 3, 14, Dept. of the Mo., 1862; Do. 4, Dept. of N. M 1864; Do. 97, Dept. of Dakota, 1871; G. C. M. O. 54, Dept. of the 1876.

3. It is not unusual to head the proceedings of the successive a trial—"First Day"—"Second Day," &c. So, the records c successively tried by the same court are sometimes endorsed as— Case"—"Second Case," &c.

4. "In every case the particular *date* of the first and each sub meeting should be stated in the record." G. C. M. O. 54, Dept Platte, 1875, (Gen. Crook.)

members present on each day though they may be always ne.[1] Their rank should of course be given, but a variance designation of the rank of a member in any day's progs from the designation of the same in the convening occasioned by the promotion or new appointment meanof the member, will not affect the validity of the proceedhe member being otherwise sufficiently identified.[2] Where, er, a member has been so promoted, &c., the fact should ly be noted in the proceedings of the day on which he first his seat with his new rank. Other changes in the *per*of the members, as the relieving of old members or detailnew ones, should be entered in the record of the session at the same are officially communicated to the court.

presence of the judge advocate,[3] and of the accused, that of the counsel, if any,) should also be particularized. a new judge advocate has been detailed, the fact and that attendance should be specified. On all days and occasions trial on which any material proceeding is had or business , the accused,—unless he has wilfully absented himself, as aping from military custody or deserting the service, or has bliged to be removed on account of drunkenness or dis- conduct,[4]—is entitled to be present and his presence is al to the legality of the proceedings and sentence.[5] When t, therefore, the fact of his presence should be affirmatively at the commencement of the record of the day's session,

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e G. O. 3, Dept. of the Pacific, 1863; Do. 5, Dept. of La., 1868. . 37, Middle Mil. Dept., 1865, Gen. Hancock comments on an onal record as follows:—"Upon one day 'all' are recorded as ; upon another 'all but one;' upon another 'all but two:' no one idualized, and the presumption is that certain members absent one en testimony was received were permitted to act and take part in iberations of the court on subsequent days. This is inexcusable nce."

e G. O. 40, Dept. of Ark., 1864.

he presence of this official should not be left to be inferred from stated of his being sworn, or of his putting questions to the witbut should be specifically declared. G. C. M. O. 45, Dept. of 1874.

e Prendergast, 208.

O. 185, Dept. of the Ohio, 1863; Do. 81, Northern Dept., 1864; Dept. of Ark., 1865; DIGEST, 415; Simmons § 470; Clode, M. . And compare Long *v.* State, 52 Miss. 23; Graham *v.* State, 40); Witt *v.* State, 5 Cold. 11.

and not left to presumption.[1] If absent, his absence s similarly accounted for.

If on the second or a subsequent day, a quorum does no or the judge advocate or accused is prevented by sickness wise from being present, the record will properly specif absent, and will in general add that the members pre journed on account of such absence. Members who firs on a day subsequent to that of the original assembling will render some explanation of their previous absence, which entered in the proceedings for the information of the re authority:[2] under similar circumstances, a similar excuse be offered by the judge advocate, and recorded. Unless th has been authorized, by the convening or a subsequent O "*sit without regard to hours*," the record will properly st hour of assembling as well as of adjournment on each that it may appear that Art. 94 has been complied wit statement, however, is not an *essential*, since, in the abs evidence to the contrary, it will be *presumed* that the lega were observed.[3]

Where *adjournments* are taken or *continuances* grante periods should be specified, and it should appear from the that the court reassembled on the day thus fixed.[4] A sta of an adjournment to the next or a succeeding day sho noted at the end of each day's session. This statement required to be subscribed by the president and judge advo by the latter; though it sometimes is so subscribed in pra

Further the record of each day's session after the firs if such was the fact—properly state at the opening, (thou is not an essential,) that the proceedings of the previou session were read and approved; any corrections made up reading being specifically noted.[5]

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1. See authorities cited in last note.

2. See G. O. 4, Dept. of N. Mexico, 1864; Do. 106, Dept. of 1871.

3. On this subject, see DIGEST, 78, 419.

4. In a case in G. O. 180, Fifth Mil. Dist., 1869, one of the upon which the sentence was disapproved was that the court occasion reassembled on a day different from that to which it cifically adjourned on a previous day. And see, to a similar e O. 5, Dept. of La., 1868.

5. See DIGEST, 419.

tement as to Challenges. Art. 88 entitles the accused
ıllenge the members separately "for cause stated to the
" Par. 914 of the Army Regulations prescribes that—
record must show * * * that he" (the accused) "was
ɔusly," (*i. e.* before the court was sworn,) "asked whether
d any objection to any member, and his answer thereto."[1]
ecord should thus show that the Order or Orders convening
ɔurt and detailing the members present were read to the ac-
or communicated to him, and that he was afforded an op-
nity of challenge by being asked if he objected to any
ɔer. If his answer is a negative one, the record should so
If in answer the accused makes any specific objection or
:ions, the same should be indicated, and the proceedings
ıpon had as to each member objected to, including the per-
declaration, if any be made, of the member, and, if issue
ned on the challenge, the argument or remarks of the judge
ate and of the accused or his counsel, with the evidence
:ed if any, and finally the decision of the court in each
—should be fully set forth. If a member be added to the
subsequently to the organization, the record should simi-
show that the opportunity to object to such member was
lly afforded the accused, with the proceedings had in case
allenge.
: absence of an express declaration in the record to the
that the accused was afforded an opportunity of challenge
n some instances, been held fatal to the validity of the
ıce; in others, has been treated as ground merely for the
ɔroval of the proceedings. In the opinion of the author,
ɔmission, though constituting certainly a grave irregularity,
ıot—being an omission to comply not with a statute but
ın army regulation only—amount to a fatal defect.[2]
ıfter opportunity for challenge has been duly afforded the
:d, the judge advocate should object to a member or mem-

When a challenge interposed by the accused has been acted upon,
:ord will properly show that he was asked whether he had any
er" objections to the members, and his answer. See G. C. M. O.
ɔt. of Dakota, 1882.

ı III Opins. At. Gen., 397, the opinion is expressed by Attorney
l Grundy that 'its not appearing on the record that the prisoner
ced if he had any objection to the members of the court
sufficient cause for setting aside the proceedings.'

bers on the part of the prosecution, record will be similarly of such objection and of the proceedings thereupon had.

Statement as to the qualifying of the members judge advocate, and organization for trial. Par. Army Regulations, directs that the record shall "show th court and judge advocate were duly sworn in the presence c prisoner." The record should therefore so state, and a state to this effect is sufficient without any recital of or referen the form of the oath as prescribed by Arts. 84 and 85. statement is to be made at the beginning of each separate re since the court and judge advocate are required to be s anew for each case tried.[1] If an absent member is admitte a new member added, or new judge advocate detailed after original swearing of the court and judge advocate, the re should similarly show that such member or judge advoc before acting, was properly separately sworn.[2]

The form of statement as to the administering of the oa most commonly adopted, is substantially that proposed by Ju Advocate General Holt, as follows: '*The members of the a were then severally duly sworn by the judge advocate, and the ju advocate was then duly sworn by the president of the court; al which oaths were administered in the presence of the accus* This is a suitable form for inferior equally as for general cou Where several persons are to be jointly arraigned and tried, record may well specify that the oaths were administered in presence of *all* the accused.

But while the above form is to be recommended, any statem will, it is believed, properly be deemed sufficient from whic can be ascertained or fairly presumed by the reviewing autho that the members and judge advocate were in fact qualified required by the Articles of war prior to the arraignment. omission of the term "duly," or of the words "in the prese of the accused," has in some cases been held to vitiate the ceedings and sentence, in others has been treated as ground me

1. DIGEST, 416; G. O. 60 of 1873. Compare Coffin *v.* Wilbo Pick. 150.

2. See G. O. 68 of 1863; G. C. M. O. 259 of 1865; G. O. 46, Dep the East, 1864; Do. 41, Dept. of Ark., 1864; Do. 5, Fourth Mil. D 1868; G. C. M. O. 6, Dept. of Miss., 1865; G. O. 42, Dept. of the Te 1863.

ıe disapproval of the same. In the opinion of the author, .er of these terms is *essential.* But to omit either would be jeɛt a form established by regulation and usage, and would ce an uncertain and unsafe mode of statement of a material important particular.

is upon the due and formal swearing of a quorum of mem- that the court is, properly speaking, *organized* for the par- ar trial.[1] After setting forth, therefore, the qualifying of the ıbers and judge advocate, the record may well add a statement ıe effeɛt that—*The court being duly organized then proceeded e trial of the accused,* (naming him,) *upon the following charges specifications.*

'atement of charges, arraignment and pleas. The ges and specifications—originals or copies—including "addi- al" charges, if any, should then follow or be specifically re- ɜd to as annexed to the proceedings. The preferable form, that almost invariably practiced, is to insert them in the body ıe record at this point. Where—as is more usual—a copy is ɜn, the name of the officer by whom the originals were signed ıld appear at the foot. This is not indeed essential, but as a erial part of the history of the prosecution should not be tted in a case of any importance.[2]

he record will then proceed to state the faɛt of the arraign- ıt of the accused upon the charges and specifications, and his s of Guilty or Not Guilty to the same respectively. Where plea is identical to all, it may be recited that—'to all of which ges,' &c., he pleaded 'Guilty' or 'Not Guilty,' or in terms uch effeɛt. The approved form of statement, however, is to r the pleas separately as made to each several charge or speci- ion in its order.

a special plea is interposed at this stage,—as a plea to the sdiction, or a plea of the statute of limitations, of pardon, or ɔrmer trial,—the same should be specified with the grounds ı which it is based. If expressed in writing, the written plea be incorporated in the record, or referred to as annexed.

Par. 914, Army Regs., directs:—"The record must show that the : was organized as the law requires." That is to say, that at least nembers, accepted by the parties or held competent on chal duly sworn for the trial.

See DIGEST, 417.

The issue, if any, raised upon the plea, with the evidence, if any, argument, and ruling of the court, will follow. If the plea be sustained, and the same has covered all the charges, the record will terminate with a statement of adjournment. If it be overruled, the next statement will regularly be that the accused was then called upon to plead to the merits, and pleaded accordingly, with a recital of the pleas as made. Should a *motion*—as a motion to strike out—be made at this point, the proceedings will be similarly set forth. If, upon arraignment, the accused *stand mute*, this fact, with the action thereupon taken as required by Art. 8, should be particularized.

Statement of the testimony. The record must set forth fully and independently the testimony of each witness,[2] specifying by which side—prosecution or defence—he is introduced, and that he is first duly sworn or affirmed as the case may be. The testimony should be given, not in mass, but in the form of separate answers to specific questions.[3] The answers as recorded should be as nearly as practicable in the exact words of the witness, no matter how indefinite, disconnected, ungrammatical or inelegant the same may be.[4] If the answers as rendered are liable to be misunderstood, the accused should be called upon for further questions to explain the obscure portions.[5] For the judge advocate to assume to translate the testimony into what he considers elegant or correct English, or to substitute his own language for that of the witness, or to record only such testimony as he may deem material, or to abbreviate or summarize the testimony,—would constitute not merely a serious dereliction of duty

1. See III Opins. At. Gen., 545.

2. A mere reference to the testimony of such witness, as taken in a similar case previously tried by the same court, is of course wholly insufficient. See G. O. 2, Dept. of the Pacific, 1863; Do. 29, Dept. of the Platte, 1869. (Remarks of Gen. Augur.)

3. G. O. 77, Dept. of the East, 1870. In G. O. 11, Dept. of the Platte, 1868, it was noticed as a serious irregularity that in the proceedings in several cases there was "an omission to record the questions propounded." Similarly in G. O. 8, First Mil. Dist., 1868.

4. Hough, (A.) 79, writes—"But to record at all times barrack phraseology is not expected." And Coppée, (p. 74,)—"In case the witness is a foreigner, his idiomatic mistakes may be corrected in the record." The only safe and accurate mode is to record the testimony *precisely given*, calling upon the witness afterward to explain it, if necessary, elucidating it by other evidence.

5. See last note.

is part but a very grave irregularity on the part of the court .itting it.[1] Where any considerable amount of testimony been given by a witness, especially where it has been taken n in short hand, the record should show that it was read over ie witness, opportunity being afforded him to make correc- s, and was pronounced by him to be correctly recorded.

/here a deposition, or other written or documentary evidence, :ther original or copy, is introduced, the same will in general 'erably be marked and attached to the record as an exhibit, ier reference being made thereto in the body of the proceed- .[2] A brief writing, however—as a simple post or field Order, t letter, &c.—may well be copied into the record of the day's on, the original, if such be introduced, being annexed at the and so indicated.

herever the admission of evidence is objected to, the nature ie objection should be stated, with the discussion, if any, and the ruling of the court upon the issue. The charac- if evidence which is ruled out should appear as clearly as of evidence which is admitted.[3] A clearing of the court for

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DIGEST, 417. An irregularity of this class, which has properly pointedly condemned in several cases, is the omission to record in : or in part the testimony of a witness on the ground that such tes- ny is merely *corroborative* of that of a previous witness. In a case O. 192, Dept. of the Ohio, 1863, the proceedings were disapproved count of such an omission. And see Griffiths, 109.

As to the making up of Exhibits with the record, see par. 915, r Regs.; also G. C. M. O. 80 of 1875, which directs as follows:— papers received in evidence, and other exhibits, should be securely ied to the record, but in such a way that they can be freely read, in rder in which they are received, and distinctly numbered so as to ate reference to them." Failure to attach writings introduced in nce has been frequently remarked upon in Gen. Orders. The omis- eems to have more frequently occurred where the writing was an :t from a book—as a Morning Report Book, Clothing Book, &c. :h cases, an abstract of so much as relates to the offence charged, ; actually put in evidence, should be entered in the body of the rec- r attached as an Exhibit. G. O. 63, Dept. of the East, 1864; G. O. 49, Dept. of the Mo., 1875. The rule applies equally to writ- ntroduced in proof of good character—as testimonials, honorable urges, &c. Copies of such should properly be appended at the end : record. G. C. M. O. 1, Dept. of the Platte, 1880; Do. 64, Div. ific & Dept. of Cal., 1881.

See Lieut. Col. Fremont's Trial, p. 240. The con wer to *expunge* as inadmissible or improper an d. Capt. Barron's Trial, p. 47.

deliberation upon an objection to testimony, with the subsequ reopening, should be specifically noted.[1]

It is usual and convenient to specify in the record the fac the closing of the testimony on the part of the prosecution, its opening on the part of the defence.

Where no evidence is introduced by the accused, it sh appear that he was afforded an opportunity to make a defenc being called upon to offer testimony, and that he declined t so. Where also the accused or the judge advocate decline cross-examine a witness examined in chief by the other, this will properly be noted.[2]

Where the accused himself takes the stand, it should prop be stated in the record, in view of the provision of the Ac March 16, 1878, c. 37, that he is introduced as a witness for defence *at his own request.*[3]

If a witness is examined through an *interpreter*, the rec should state the occasion therefor—as that the witness is a f eigner who does not speak English or speaks it but imperfect specifying also the fact of the swearing of the interpreter.[4]

Statement as to closing arguments or addresses. T record will, in general, next set forth the written or verbal sta ment, address, or argument of the accused, if any is made, well as that of the judge advocate if he adds one. Written sta ments are almost uniformly appended at the end of the proce ings; verbal ones are more commonly inserted in the body of t record. If the accused elect not to make a statement, the reco will properly so specify.

Statement of finding and sentence. The statement of t Finding, (which should be preceded by a mention of the cleari of the court for deliberation,) will preferably set forth the fi ings on all the charges and specifications separately in ord although the conclusion as to each may be identical. The fi ings, where other than simple verdicts of Guilty or Not Guil

1. And so of the clearing and reopening wherever deliberation is upon any interlocutory question whatever.

2. G. O. 18, 31, Dept. of Cal., 1872.

3. DIGEST, 482; G. C. M. O. 13, Dept. of Texas, 1882.

4. See Chapter XVII.

ıuld be given with their qualifications, exceptions and substi-
ions, if any.[1]

'he statement of the sentence is the part of the record in which
ilure to be accurate may most easily defeat the intention of
court.[2] Care should especially be taken that there be no
erial variance in the name of the accused between the sen-
e and the specifications.[3]

xcept in the single instance of a death sentence, where, in
v of the terms of Art. 96, it may be, and in practice is, added
ıe sentence that two thirds of the members concurred therein,
eference whatever to the vote of the members by which the
ing or sentence was determined upon is to be made in the
rd. A statement that the finding or sentence was "unani-
ıs" would be a gross, and now most exceptional, irregularity.
ere the vote on a charge or specification is a tie, this fact of
rse is not to be stated, but an entry simply of Not Guilty is
e recorded.[4]

*ertifying of the sentence and authentication of the
ord.* It is directed by par. 914, Army Regulations, that the
ceedings of courts-martial shall "be authenticated by the
natures of the president and judge advocate, who shall also
tify in like manner the sentence pronounced by the court in
h case." The sentence is certified by the writing below it,
the officers designated, of their official signatures. The record
uthenticated by adding to the same, at the end of the final
ceedings had, some such form as—*A true and complete record.*

. Omissions to state or fully state findings have in some cases in-
ed a disapproval of the proceedings; in others a ruling that the pro-
lings were thus rendered invalid in law. In G. O. 292 of 1863 the
ence was disapproved, and, in Do. 297, Id., held inoperative, because
iconsistency between the findings on the charges and those on the
ifications.

See cases, in G. O. 25 and 42, Dept. of Dakota, 1868, of sentences
pproved as inoperative because failing to specify, the one the term
ı imprisonment imposed by the court, and the other the period for
feiture of pay.

G. O. 6, Dept. of La., 1868; G. C. M. O. 45, Dept. of Texas, 1874;
EST, 418.

G. C. M. O. 17 of 1871; Do. 1 of 1872. It need hardly be added
nothing in the nature of a *protest*, by a member or members, against
ling or the sentence or any action of the court, can properly be en-
upon or attached to the proceedings. See *ante*, p. 535.

Attest: A. B., *President;* C. D., *Judge Advocate.*[1] Whe president or judge advocate has been changed pending th it is of course the one officiating at the time of the authenti who is to subscribe the same.[2] The certificate and authent should, regularly, be executed in the presence of the court the final adjournment, and as a part of the proceedings. a formal authentication has been omitted, but the senten been duly certified, and the record contains no proceedi the court subsequent to the sentence, the certification of t tence may legally be accepted, and has generally been ac as a substantial authentication of the whole proceeding omission, however, is no less an irregularity.

Where the proceedings have been formally duly authent and the record is subsequently returned for correction, an tional proceedings are thereupon had, it will be regular and to repeat the form of authentication at the end of such add proceedings.[4]

Statement of final adjournment. It is customary a statement of this character at the end of the record, b same is not required by law or regulation, and is quite un sary.[5] The formal *authentication* of the record is the leg proper final proceeding of the court.

The recommendation. This, as indicated in Chapte is no part of the legal record. When made, however, it is u entered upon a blank page after the final authentication or an appended paper. The body of it may be written by the signing members, or by the judge advocate or a clerk members' dictation.

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1. A similar form has been adopted in the Dept. of California Circular of that Dept., of May 20, 1885. A statement of a final *ad ment*, signed by these two officers, has sometimes been employe form of authentication, but is clearly not properly such. Tha statement is itself without legal significance in the record, see *post*

2. See DIGEST, 301, 418; G. C. M. O. 22, Dept. of the Columbia

3. DIGEST, 418; G. C. M. O. 23, Dept. of Cal., 1884. The is unable to concur with the view as adopted in G. C. M. O. 30, of the East, 1882.

4. See G. O. 7, Dept. of the South, 1869.

5. DIGEST, 103.

Statement of proceedings upon revision. Where, as he authorized to do, the reviewing authority returns the record to : court for the correction of error, the proceedings thereupon l should, as indicated in Chapter XXI, constitute a separate ord in themselves, which, though properly attached at the end the original record, should be quite independent of and dis- ct from the same. This, (which may well be headed—*Pro- dings on Revision*,) will regularly recite that the court assem- d at a certain time and place,—certain members named, and stituting a quorum of those who took part in the trial, being sent,—in pursuance of the following Order or communication, in terms to such effect. The Order directing the reassembling the court, and indicating the reason therefor, with accompany- : papers if any, will then be inserted or referred to as appended. The action taken by the court in making the correction, or erwise, will follow, and the whole be authenticated by the natures of the president and judge advocate. As set forth in apter XXI, the conclusion and action of the court in making l declaring the correction must wholly appear in the separate ord of the revision. The portion of the original record to ich the correction applies will be designated of course by the per reference, but such portion is to be left as it stands, with- t erasure, interlineation, rewriting, note, or any other addition modification whatever.[1]

Statement of action of reviewing authority. This, ile no part of the record of the court, completes the history the case tried, and is accordingly, as a general rule, written or upon the record after the last proceeding of the court— st properly after the formal authentication. The Army Reg- tions[2] indeed direct in regard to it, that—"The confirming hority shall state at the end of the proceedings in each case decision and orders thereon."

t consists usually, as has already been indicated,[3] of a state- nt, headed by a designation of the place, (headquarters of the mmand,) and date, and signed by the reviewing officer in his cial capacity, to the effect that the proceedings, findings and

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See DIGEST, 419, 440, 441; Chapter XXI—"Return of the pro- lings for correction."

Par. 918.

See Chapter XXI—"Formulating of action," &c.

sentence are approved, or disapproved, in whole or in part, as case may be, with such modification of the sentence by remissio commutation, or mitigation, if any, as may be deemed just an proper. Such directions, in regard to the manner and form o executing the sentence or a punishment as may be necessary, an added; and if the punishment adjudged is a reprimand, to be administered by the reviewing officer, it is administered in terms accordingly. The approval, disapproval, &c., may be stated without reasons or remarks, or may be accompanied by such comments upon the facts of the case, proceedings of the court, &c., as may be deemed to be called for.

Where the sentence adjudged is one requiring, for its execution, the confirmation of the President, (or other superior authority,) or where the execution of the sentence is suspended under Art. 111, the action will in general consist simply of an approval of the proceedings and sentence, and a declaration that the proceedings are forwarded, (the execution of the sentence being stated—where such is the fact—to be suspended,) for the action of the President, &c. The record having reached the latter, his action confirming, disapproving, remitting, commuting, or mitigating the sentence, with remarks if any, is written upon the record under or after that of the original reviewing authority, and the formal action is complete.

It is to be added that the action taken should be written in or upon each and every separate case tried by the court, though it may be identical in each; and further that to append to a record a copy of the written or printed Order promulgating the proceedings, in lieu of a written approval or other action over the signature of the reviewing officer, is irregular and insufficient since this would be a substitution of a copy for the original.[1]

Endorsement of the record. This, which is placed upon the record before the transmittal of the proceedings to the reviewing authority and his action thereon, should properly be in the form prescribed in par. 917 of the Regulations.

Effect of Loss or Destruction of Record of Trial. Where, by casualty of war, accident, or otherwise, a record duly completed and finally acted upon by the reviewing

1. DIGEST, 418.

been lost or destroyed, the judgment of the court is affected, and the sentence, if any, may legally be in any other case.[1] If the record be lost *before* the have been completed or been acted upon, they are vacated unless the record can be made up again from otes in the possession of the judge advocate or remember.[2] In such a case indeed, the trial may be , unless,—an acquittal or conviction having been he original hearing,—the accused interposes a plea rial.[3]

tion of Law as to Regularity of Proceedings ecords. Where it appears on the face of a record tial that the court was legally constituted and comad jurisdiction of the case tried, reasonable prell be made by the law in favor of the sufficiency edings, which, provided that no statutory requireen disregarded, will in general, irregular though they form, properly be held to be regular in substance fact.[3] As to any action indeed provided by *statute* by the court, the record should clearly indicate that on has been complied with, but that it does so in bald ft terms will not in general affect the validity of the or judgment, since the law will presume that what have been done was *duly* done.[4] And the presump-

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421.

nons § 743–4; Gorham, 69; also Rules of Procedure, 94, 98. s presumption of "*omnia rite acta*," in civil cases, see Slade anch C., 139; Hutton *v.* Blaine, 2 S. & R. 75, 79; Moore Id., 197; Trinity Church *v.* Higgins, 4 Robt. 1; Edwards *v.* s. 581. As to military cases, see Rex *v.* Suddis, 1 East, Case, Perry, 419; DIGEST, 420–422, note; Chapter V,

has been held in civil cases that, where the record simply he jury had been *sworn*, it was to be *presumed* that the in legal form, or "according to law." Edwards *v.* State, *v.* State, 26 Miss. 362. Otherwise, however, where the rec- contain any statement whatever in regard to the swearing. im of the law will apply, that what does not appear at all ered as not having existed or been done. Se-

That an absence from the record of an he court or judge advocate has been ntence, unless the omission can be

tion will be stronger as to a particular required by regulation or usage only.[1] Thus where—as more frequently occurs in the hurry of time of war—the statements and recitals of a record of a legal court-martial are incomplete or otherwise defective, it will not necessarily result that the validity of the sentence adjudged is to be held to be fatally affected. If only the acts and formalities required of the court by the Articles of war or other *statute* are found to have been substantially observed and performed, the law will in general presume that the details of the proceedings were due and sufficient, and a failure of justice thus be obviated.

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has been repeatedly held. III Opins. At. Gen., 396, 544; G. O. 32 of 1863; G. C. M. O. 21, Dept. of the Columbia, 1880.

1. Thus, though it has sometimes been held otherwise, an omission to state in the record that the court was sworn 'in the presence of the accused' will not, in the opinion of the author, affect the legal validity of the proceedings or sentence, where it may fairly be presumed from the other statements in the record that the accused was present in fact. See Trinity Church *v.* Higgins, 4 Robt. 1 : Hough, (P.) 759.

CHAPTER XXIV.

COURTS OF INQUIRY.

ubject of this Chapter will be considered under the fol-
heads:—I. The Law relating to the Court of Inquiry;
Nature, in general; III. Its Constitution; IV. Its Com-
; V. Its Function; VI. The Recorder; VII. Procedure;
ction on the Proceedings; IX. The Proceedings as Evi-

I. THE LAW ON THE SUBJECT.

les of War. The law relating to Courts of Inquiry—
ed with but slight modification from the provisions of
cles of 1786[1]—is almost entirely contained in the seven
of the existing code, from the 115th to the 121st, as

. 115. *A court of inquiry, to examine into the nature of*
isaction of, or accusation or imputation against, any officer
r, may be ordered by the President or by any commanding
but, as courts of inquiry may be perverted to dishonorable
s, and may be employed, in the hands of weak and envious
dants, as engines for the destruction of military merit, they
er be ordered by any commanding officer, except upon a de-
the officer or soldier whose conduct is to be inquired of.
. 116. *A court of inquiry shall consist of one or more officers,*
eding three, and a recorder, to reduce the proceedings and
to writing.

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r to this date, Courts of Inquiry in the army were sometimes
by Commanders under their general authority as such, and on
asions were directed to be convened by Resolutions of Con-
ee, for example, the case of the Inquiry directed by Congress
ered by General Washington into the conduct of officers "in
da Department," and other instances, in 1 Jour. Cong., 384,
Do., 625.

"ART. 117. *The recorder of a court of inquiry shall admi to the members the following oath: 'You shall well and trul amine and inquire, according to the evidence, into the matter before you, without partiality, favor, affection, prejudice, or h reward: so help you God.' After which the president of the shall administer to the recorder the following oath: 'You, A. swear that you will, according to your best abilities, accuratel impartially record the proceedings of the court and the evide be given in the case in hearing: so help you God.'*

"ART. 118. *A court of inquiry, and the recorder thereof, have the same power to summon and examine witnesses as is to courts-martial and the judge advocates thereof. Such wit shall take the same oath which is taken by witnesses before a martial, and the party accused shall be permitted to examin cross-examine them, so as fully to investigate the circumstan question.*

"ART. 119. *A court of inquiry shall not give an opinion o merits of the case inquired of unless specially ordered to do so.*

"ART. 120. *The proceedings of a court of inquiry must b thenticated by the signatures of the recorder and the pres thereof, and delivered to the commanding officer.*

"ART. 121. *The proceedings of a court of inquiry may b mitted as evidence by a court-martial, in cases not capital, no tending to the dismissal of an officer:* provided, *that the cir stances are such that oral testimony cannot be obtained.*"

Other Statutes. The Act of March 16, 1878, c. 37, w enables "the person charged" to testify as a witness b "courts-martial and courts of inquiry," is the only exis statute, (other than the Articles of war,) relating in term these courts. The provision of Sec. 1203, Rev. Sts., empo ing "the judge advocate of a *military court*" to "appoi reporter who shall record the proceedings of and testimony t before such court," though not in terms applying to cases fore courts of inquiry, has, in practice, been viewed as auth ing recorders of such courts to make such appointment. 1202, Rev. Sts., by which "every judge advocate of *a c martial*" is empowered to issue process to compel the attend of witnesses, applies in its terms still less than Sec. 1203 t corders of courts of inquiry, and cannot, in the opinion o

ıor, legally be extended to the latter.[1] A statute authoriz- a restraint of the liberty of the citizen is to be strictly con- ed.

he British Law. The law in regard to the British court ıquiry—a body of inferior scope and powers as compared with same court under our code—is mainly contained in the 123d he Rules of Procedure.[2]

II. THE NATURE OF THE COURT.

s Distinguished from a Court-Martial. The court of ıiry, so called, is really not a court at all. No criminal issue rmed before it, it arraigns no prisoner, receives no plea, makes ınding of guilt or innocence, awards no punishment. Its pro- lings are not a trial, nor is its opinion, (when it expresses one,) dgment. It does not administer justice, and is not sworn to o but simply to "examine and inquire."[3] It is thus not a rt but rather a Board[4]—a board of investigation with the in- ntal authority, (when expressly conferred upon it,) of pro-

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The original statute,—a provision of the Act of March 3, 1863, 5,—read: "Every judge advocate of a court-martial or court of ıiry." The words "or court of inquiry" were omitted by Congress ıacting the Revised Statutes. See Chapter XIII.

See also (in Appendix) Army Act § 72, and Rule of Procedure 124,) the special court of inquiry for the investigation of cases of unau- ized absence.

As to its nature, compare Adye, 83; Delafons, 46; Tytler, 343–346; mons § 334; Hough, 28; Harcourt, 173–4; Hughes, 160; Fonblanque, ; Maltby, 137; De Hart, 273–4; 3 Greenl. Ev. § 475; DIGEST, 96— ;, 98, 427; Trial of Capt. D. Porter, (Navy,) p. 10. In the British es of Procedure, 123 (D,) it is said:—"A court of inquiry has no cial power, and is in strictness not a court at all, but an assembly of ıons directed by a commanding officer to collect evidence with re- :t to a transaction into which he cannot conveniently himself make ıiry."

. Kennedy, 239; Coppée, 95; DIGEST, 96, note. In Simmons § 334; 'court, 174; and Griffiths, 133, it is styled a "*council.*" In the late : of The W. B. Chester's Owners *v.* U. S., 19 Ct. Cl. 683, the court :—"A naval or military court of inquiry is not a judicial tribunal. It ıstituted solely for the purpose of investigation, as an assistance to President, the head of the Department, or the commanding officer, etermining whether or not any further proceeding, executive or ju- ıl, ought to be taken in relation to the subject-matter of the inquiry. re is no issue joined between parties, and its proceedings are not :ial."

nouncing a conclusion upon the facts. But, as it is a sworn and as the witnesses before it are sworn and examined and examined as before courts-martial, it is a Board of a highe in the nature of a court, and has thus come to be termed a in the law military.

Its Character and Significance Illustrated. Bu court of inquiry, though not a judicial body, is an instrume of no little scope and importance; its investigations are freq much more extended and its conclusions more compreh than would be those of a court-martial in a similar case; a individual instances, its results may be scarcely less final t it had the power to convict and sentence.[1] It is mainly ever, as contributions to history or to the annals of the Arm the researches of the courts under consideration are sign and valuable. Thus, among the courts of inquiry held i army of which the reports have proved to be important papers, may be cited the following:—

That convened in the case of Major John André, Adjutan eral to the British Army, by General Washington as Comm in-chief, on September 29, 1780, under the name of a "Bo and consisting of six Major Generals, [Greene, (the presi Lord Sterling, St. Clair, the Marquis de la Fayette, How the Baron de Steuben,] and eight Brigadier Generals, [Pa Clinton, Knox, Glover, Patterson, Hand, Huntington, Starke,] with John Lawrence, Judge Advocate General, a corder, and directed "to report a precise state of the case," an "opinion of the light in which he (André) ought to be sidered and the punishment that ought to be inflicted." Court, after considering the evidence, reported a statement o facts found, with an opinion that the accused "ought to be sidered as a spy from the enemy, and that, agreeable to the and usage of nations, he ought to suffer death:"[2]

That convened in 1791, by direction of the President, in

1. As where the report of the court has served as the ground an casion for the summary dismissal of an officer. Tytler, 345–6; Pre gast, 211. And see cases in G. O. 15 of 1835; Do. of Nov. 23, 1 Do. 183 of 1862; Do. 12, Dept. of the Tenn., 1863, (case of eight of of the 109th Ills. Vols.) Compare also the result in the case of A (*post*,) who was hung as a spy on the fourth day after the concl of the proceedings of the court of inquiry.

2. Proceedings published, Philadelphia, 1780; reprinted, Albany.

›f Brig. Gen. Harmar, to inquire into his conduct as com-
ing officer on the expedition against the Miami Indians in
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ıt convened by President Jefferson in 1808, in the case of
Gen. Jas. Wilkinson, to investigate the charge of his having
rated with the Spanish government of Louisiana adversely
United States. A trial by court-martial followed in 1811,
ich he was fully acquitted:[2]

ıt convened by an order of President Madison of Jany. 21,
in the case of Brig. Gen. W. H. Winder, to inquire into his
ct as commanding officer of the U. S. forces during the
h attack on Washington in August, 1814:

ıt convened by President Jackson, at Frederick, Maryland,
vember, 1836, to inquire into "the causes of the failure of
mpaigns in Florida against the Seminole Indians, under
›mmand of Gens. Gaines and Scott," and also into the cam-
against the hostile Creeks:[3]

ıt convened by President Van Buren, at Knoxville, Tenn.,
ptember, 1837, "to examine into the transactions of Bvt.
Gen. Wool, and others of his command, in reference to his
ıeir conduct in the Cherokee country:"[4]

ıt convened in Mexico, by G. O. 186, Hdqrs. of the Army,
at the instance of Brig. Gen. Worth, to inquire into certain
rs connected with the capitulation of Puebla, in which he
ived himself injured by Gen. Scott:

ıt convened in 1848, in the City of Mexico, in the case of
Gen. Pillow, which investigated charges preferred against
fficer by Maj. Gen. Scott, in regard to official reports made
e former of the battles of Contreras, Churubusco, &c.:[5]

ıt convened by the President at Washington, in September,
"to investigate the circumstances of the abandonment of
land Heights and the surrender of Harper's Ferry:"[6]

American State Papers, Military Affairs, vol. I, pp. 20-36.

G. O. of Feb. 14, 1812.

G. O. 13, of March 21, 1837; Doc. 224, Senate, 24th Congress, 2d
n. And see American State Papers, Military Affairs, vol. VII,
5-465.

G. O. 63, of Oct. 2, 1837; American State Papers, Military Affairs,
II, pp. 532-571.

G. O. 40, of July 2, 1848.

G. O. 183, of Nov. 8, 1862. This court was designated a "Milit
ıission."

That convened by the President, by Special Orders No. 356, of November 20, 1862, at Cincinnati, Ohio, "to investigate and report upon the operations of the army under the command of Maj. Gen. D. C. Buell, U. S. Vols., in Kentucky and Tennessee:"[1]

That convened by Special Orders No. 350, Headquarters of the Army, 1862, to inquire into the conduct of Maj. Gen. McDowell as a general officer during the first year of the late war:[2]

That ordered by the President, by S. O. 217 of 1868, in the case of Brig. Gen. Dyer, Chief of Ordnance, which was charged especially with the duty of examining into certain accusations made against that officer in a report of a Committee of Congress:[3]

That ordered by the President, by S. O. 35 of 1874, in the case of Brig. Gen. Howard, under the provisions of a Joint Resolution of Congress of Feb. 13, 1874, and directed, as required by the Resolution, "to fully investigate" certain indicated charges against said officer, "and to report their opinion, as well upon moral as upon technical and legal responsibility for such offences, if any, as may be discovered:"[4]

That ordered by the President, by S. O. 277 of 1879, in the case of Lieut. Col. Warren, Corps of Engineers, 'for the purpose of inquiring into his conduct as major general commanding the 5th Army Corps, at the battle of Five Forks, Virginia, on April 1, 1865, and into the operations of his command on that day and the day previous:'[5]

That convened by direction of the President, by S. O. 241, of October 31, 1883, "to investigate the organization and fitting out of the Greely relief expedition party, transported by the steamer Proteus:"[6]

That convened by direction of the President by S. O. 93 of 1884, to investigate certain charges, preferred by a civilian, A. [illegible] Bateman, against Brig. Gen. D. G. Swaim, Judge Advocate Gen[illegible]

1. The proceedings were never promulgated in Orders.

2. Rebellion Record, Series I, Vol. XII, Part I, pp. 36 to 332.

3. G. O. 51, of May 15, 1869. Proceedings printed at Govt. Printing Office, 1869.

4. G. O. 75 of 1874; Proceedings printed at Govt. Printing Office, 1874.

5. G. O. 132 of 1882; Proceedings printed at Govt. Printing Office, 1883.

6. "Proceedings of the 'Proteus' Court of Inquiry on the Greely Relief Expedition." Govt. Printing Office, 1884.

tal of the Army, the report of which formed the basis of the ıbsequent court-martial proceedings published in G. C. M. O.) of 1885.[1]

III. ITS CONSTITUTION.

Authority of Commanding Officer and President re-ectively. It is provided, as has been seen, in Art. 115 that—

. The proceedings of the court of inquiry are contained in a volume ›lished at the Govt. Printing Office, 1884.

ımong other important courts of inquiry in the army may be men-ıed those in the following cases:—Case of Lieut. Lane, charged with ıulting a member of Congress. (G. O. 15 of 1835.) Case of Private lap, involving a construction of the present Thirtieth Article. (G. 13 of 1843.) Case of Capt. P. S. Cooke, relating to protection given raders in Texas. (G. O. 6 of 1844.) Case of Ast. Surg. Byrne, relat-to a collision between him and Surgeon General Lawson. (G. O. 42 of ,9.) Case of Col. D. S. Miles, charged with misconduct at the battle Bull Run. (G. O. 42, Army of the Potomac, 1861.) Cases of a Col-ɜl and a Captain of Vols., charged with misconduct at the same battle. . O. 30, Dept. of N. E. Va., 1861.) Case of Brig. Gen. Martindale—ıuiry into a charge preferred against him by Maj. Gen. Porter. (G. 178 of 1862.) Case of the burning of the steamer Ruth. (G. O. 344 1863.) Cases of certain corps, &c., commanders, as to their conduct the battles of Sept. 19th and 20th, 1863. (Court ordered in G. O. 322 1863. Result not promulgated.) Case of members of the 109th Ills. fy., charged with disloyalty. (G. O. 12, Dept. of Tenn., 1863.) Cases Col. A. A. Gibson, 2d Pa. Arty., and Col. C. M. Alexander, 2d Dist. ɔl. Vols., as to details of the command and discipline of their regi-ents, &c. (G. O. 22, 139, Dept. of Washington, 1864.) Case of an quiry into the transactions of the commanding officer in charge of the ualpai Indians in Arizona in 1874–5. (G. O. 6 of 1876.) Case of Lt. ɔl. Eddy and Capt. Martin, Quartermaster Dept., as to the administra-ın of the Q. M. Depôt at San Francisco, and certain frauds committed erein. (G. O. 10 of 1877.) Case of Major Reno—as to his conduct the battle of Little Big Horn River, on June 25th and 26th, 1876. ·. O. 17 of 1879.) Case of an inquiry instituted on the application of ɔl. E. A. Carr, as to a hostile expedition against Apache Indians August, 1881. (G. O. 125 of 1882.) Also courts of inquiry held the cases of officers charged with the shooting, &c., and killing mutinous or insubordinate inferiors, mostly in time of war, and of ıich conclusions are published in the following Orders:—G. O. 29, ·pt. of N. E. Va., 1861; Do. 46, Army of the Potomac, 1862; Do. 30, nks' Division, 1862; Do. 5, Dept. of N. Mexico, 1863; Do. 76, Dept. W. Va., 1864; Do. 20, Dept. of the Platte, 1871. With which see Brien, 76, as to case of Col. Parrish, Florida, 1836. Other courts of .uiry than those here specified will be noticed in the course of the ıpter. Proceedings of important Courts of Inquiry in the Confed-te States army are published in G. O. 19, A. & I. G. O., Richmond, ›1; Do. 28, 108, Id., 1862; Do. 81, 152, Id., 1863.

"*A court of inquiry may be ordered by the President or by any commanding officer,*" but, for a certain reason stated,[1] "*shall never be ordered by a commanding officer except upon a demand by the officer or soldier whose conduct is to be inquired of.*"

The comprehensive designation—"any commanding officer"[2] indicates that the authority to constitute courts of inquiry is not necessarily restricted, as has sometimes been supposed,[3] to commanders who would be authorized to convene courts-martial in the same cases, but properly includes any and every 'commanding officer,' as the term is understood in the service;[4] the power conferred being thus made incident to distinctive command as such. Thus the commander of a district, post, regiment, or independent company or detachment, may order this court with the same legality as may the commander of a department or army. The exercise, however, of such authority on the part of an inferior commander, or in a case of a soldier, is of rare occurrence in our service.[5]

The authority, however, of the commanding officer is not unqualified, but subject to the limitation prescribed in the last clause of the Article; it can be exercised only conditionally upon the court being 'demanded' by the interested party. It is the President alone whose authority under the Article is absolute, and he may avail himself of this authority either by himself convening the court in Orders from the War Department, or by directing the same to be convened by a military commander.

Discretion of Convening Official. But the exercise of the authority, whether absolute or conditional, is discretionary. Neither the President nor a commanding officer is *obliged* to order the court under any circumstances; the question whether or not

1. In VIII Opins. 342, Atty. Gen. Cushing comments forcibly on the part of the Article, concluding with the expression of opinion that "the reflection on officers of the army" contained in it is "unjust and out of place."

2. A similar designation is employed in the British law. Rules of Procedure, 123.

3. G. O. 78 of 1880.

4. For a definition of this term, see Chapter IX—"By whom and is to be imposed."

5. DIGEST, 97. The proceedings of a comparatively recent court inquiry in the case of an enlisted man, charged with killing a public by hard riding, are published in G. O. 27, Dept. of Cal., 1867.

court shall be ordered in a particular case being one to be de-
rmined, not merely by the wishes of the aggrieved party, but
so and mainly by such considerations of expediency or justice
may address themselves to the superior. The word "demand,"
employed in the Article, does not imply a right on the part of
e officer or soldier, but is to be construed as synonymous with
uested or applied for. It is optional, therefore, with a com-
nding officer to refuse the application; but, in the event o
h refusal, the party, if not satisfied, may appeal to higher au-
rity, as in any other case of an official request not granted by
immediate commander. Applications for courts of inquiry
in fact not unfrequently refused, on the ground that to order
e same would be opposed to the interests of the service.

The Convening Order, &c. The *form* of constituting a court
inquiry is by a General or Special Order, similar to that em-
yed for ordering a court-martial and detailing the members;
e only difference being that, in lieu of a reference to a trial or
als to be had, the Order specifies a charge, subject, or question
be investigated, and further directs either that the court shall
ort the facts alone, or the facts with its opinion thereon,—with
h additional orders or instructions, if any, as it may be deemed
per to subjoin. At any subsequent state of the inquiry, a sup-
mental Order may be issued by the convening authority, re-
ving a member, detailing a new member or recorder,[1] adding
or modifying the instructions originally given,[2] changing the
e or place of meeting, &c.

IV. ITS COMPOSITION.

Art. 116. This Article provides that: "*A court of inquiry shall
sist of one or more officers, not exceeding three.*" As to the word
icers"—what has been said in the Chapter on the Composi-
of General Courts-Martial, in construing the same word as
ployed in Art. 75, will be for the most part applicable here.

Number of Members. A detail for the court of *less* than
e commisioned officers has been of the rarest occurrence in

[1] "It is not absolutely necessary that the same members should go
h the whole of the inquiry." Harcourt, 174. And see Simmons
De Hart, 277, note; Harwood, 161.

[2] See Coppée, 98.

our service.[1] In a few cases indeed—as in the case of the convened upon the application of Gen. Warren—a court nally composed of three members has been reduced to two i course of its investigation, and has gone on and concluded that number. In the case of André, the court, (convened l the enactment of the Article fixing the number,) was, as ha seen, composed of fourteen members. In the recent case of Howard, above noticed, it was specially provided in the Resolution that the court should "consist of not less tha officers," and it was in fact constituted with seven membe

Rank of Members. On this point the law is silent. 79, in providing that "no officer shall, when it can be av be *tried* by officers inferior to him in rank," applies of only to courts-martial. Its injunction, however, will nat and properly be observed in composing courts of inquiry, as the exigencies of the service will permit.

V. ITS FUNCTION.

In what it Consists. The function of the court of in in our service appears from Arts. 115 and 119. In the form general purpose is indicated to be—"*to examine into the natu any transaction of, or accusation or imputation against, any o or soldier.*" By the latter, it is required to "*give an opini the merits of the case,*" when "*specially ordered to do so.*"

The Investigation. The subjects of investigation con plated by the Article are of two general descriptions:—*tr actions* of officers or soldiers, a comprehensive term which include any acts whatever, though commonly confined to act a supposed questionable or exceptional character; and *accusa or imputations*, that is to say charges of crime or miscond either direct and specific, or indirect and informal, and proc ing from any competent or respectable source. More particula

1. A court of inquiry with but *one* member is convened by G. C of 1837.

2. The British law simply provides that the court "may consi any number" of officers, (Rules of Procedure, 123;) but the number generally been three or five. In the Inquiry upon the Cintra Con tion, in 1808, and also in the case of Col. Home, (Home *v.* Bentin Brod. & Bing., 131,) the number was seven.

vever, there are three[1] principal uses and purposes for which estigations by courts of inquiry are resorted to in practice, as ows:—

. ***For determining whether there should be a trial court-martial in a particular instance.*** As where isations have been made, or circumstances of a criminating racter have been reported, against a certain military person; vhere, a crime or disorder having apparently been committed everal military persons, it may be doubtful what particular vidual or individuals may be implicated or punishable;—in ı cases a court of inquiry may often profitably be convened ı directions to report all the facts, and, (as is generally re- ed,) to express also an opinion whether or not a court-martial ıld be ordered for the trial of the person or persons accused or ıd chargeable. The court of inquiry, when acting in this ıcity, has been frequently compared to a grand jury;[2] but, as party whose conduct is under investigation may be present ı counsel, and be heard in his defence, at its sessions, and its eedings may be and generally are public, the analogy indi- d is by no means complete.[3]

. ***For the purpose simply of informing and advising convening official.*** These courts are also employed to in- tigate cases, which appear to call, not for trial by court-martial, for some other military or administrative action, and in which testimony is so multifarious, complicated, or conflicting that ormal inquiry is needed for the purpose of ascertaining and orting what are the actual facts, and thus reliably informing President or Commander, and assisting his judgment. This, h or without an opinion—as he may direct—as to the bearing the facts upon the discipline of the service, the rights or lia- ities of individuals, &c.[4] In cases indeed where but a brief estigation will be sufficient, the same is not unfrequently de through an ordinary board detailed for the purpose, or

. See VI Opins. At. Gen., 239.

. See Adye, 54, 172; 1 McArthur, 108; Tytler, 223, 340; Hough, 711; ndergast, 208, 211; Clode, M. L., 196–198; Maltby, 136; De Hart, 120; I Opins. At. Gen., 347.

. DIGEST, 97; McNaghten, 176–7.

. See Tytler, 343; Simmons § 334; Kennedy L., 242; VIII Id., 341.

through the judge advocate or inspector general of the comma
It is only for such important investigations of this class as
involve the taking of a mass of testimony and the giving
full hearing to the officer, (or soldier,) whose acts have given
to the proceeding, that a court of inquiry is, in general, orde

3. For the vindication of character or conduct.
instrumentality is also not unfrequently resorted to, as a sp
of *court of honor*, for the exculpation or justification of an off
(or soldier,) whose reputation or action has been seriously asp
or injuriously criticized in some official report or authorit
publication, or who has been severely rebuked or censured
military superior, or who deems himself to have been other
aggrieved in his military capacity. In such cases the cou
usually applied for by the party himself according to the pr
ion of Art. 115.[2] Though the primary object of the inqui
vindication, the result may indeed be quite the reverse.

It is to be remarked that the several objects above indic
are not necessarily kept distinct and separate in practice, but
where the circumstances make it proper, be combined in the
vestigation ordered.

The investigation not to be diverted to foreign mat
Though considerable latitude is to be conceded to the court
its inquiry, it will not be warranted in examining a subject q
distinct from that which it has been directed to investigate. S
less where it has been ordered to investigate certain charges,
it be justified in taking into consideration *other* charges agai
the same person or any charges against a *different* person.[3]

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1. "Thus, a court of inquiry may have in charge a comprehens
subject, such as the cause of the loss of a battle, the conduct of a p
ticular corps or ship in a combat or engagement, the general condition
some administrative branch of the service, and other matters of t
nature." VIII Opins. At. Gen., 341. And see VI Id., 242; Simm
§ 334.

2. Instances may occur where two officers who have become involv
in controversy may each apply for a court of inquiry in regard to t
same transaction. In such cases the court, if convened, will practical
in the words of Williamson, (2 Mil. Ar., 132,) 'sit as a court of a
tration between the contending parties, the decision of which they h
consented to abide by.'

3. See Benét, 230.

To be confined to cases of persons in the army. The rm "*officer or soldier*," employed in the Article, clearly means ıe who is an officer or soldier of the army at the time the court ordered.[1] Transactions of or accusations against persons who ve been members of the army, but who have left it and become vilians, while the same may be indirectly involved in an investition, are not *per se* legitimate subjects for direct inquiry by s court, even though the inquiry be limited to their acts and ıduct while in the army.[2]

Not to be affected by the statute of limitations. The litary statute of limitations—Art. 103—applies only to proceedrs before courts-martial. There is no legal obstacle, therefore, a court of inquiry taking cognizance of a particular transaction matter of accusation dating back more than two years prior to : ordering of such court, and it may accordingly extend its amination to acts and occurrences of the past without regard the period which has since elapsed.[3] A peculiar advantage leed of these courts over courts-martial is that they are emwered to investigate a series of acts or course of conduct—such the administration of an office, the execution of a special trust, e management of an expedition or a campaign, the keeping of continued account of receipts and disbursements, &c., embracg, in their relations, a considerable number of years, or any definite period. While in practice these courts will rarely be lled upon to go into transactions remote in time, it is yet the ct that some of the most conspicuous instances in which courts inquiry have been resorted to in this country have been cases which a trial by court-martial was held to be barred by the

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1. Thus a court of inquiry could not legally be ordered to investigate rges against a contract surgeon. DIGEST, 97.

In G. O. 50, Mil. Div. of West Miss., 1864, are published the prosdings of a body, in form a court of inquiry, but designated a "*counof war*," by which was investigated the question whether a brigadier eral commanding the enemy's forces at Fort Morgan, Ala., had lated the laws of war in connection with the surrender of that post.

2. DIGEST, 96–7.

3. G. O. 24 of 1829; DIGEST, 88; VI Opins. At Gen., 239; VIII Id., ; Macomb, 94; Harwood, 168; Benét, 183–5. And see Debate in ate on case of Gen. Howard, Cong. Rec., 1874, No. 40, pp. 36–8. De rt, (p. 281–3,) misapprehends the law on this point; as did also the rt of inquiry in Ast. Surg. Byrne's Case, (G. O. 42 of 1849,) and in Alexander's Case, (G. O. 139, Dept. of Washington, 1864.)

lapse of the statutory period, and a court of inquiry rema only means by which the facts could be satisfactorily inv or the person vindicated or the reverse.[1]

The Opinion—*Art. 119.* In view of the positive this Article, the court, unless expressly required to give ion, could scarcely properly make even a recommend suggestion as to the merits of the case, since the same general involve a certain measure of opinion.

As required and rendered. The opinion requi court of inquiry is, in general, as already indicated, an whether, upon the facts as developed by the investigatic ticular officer or soldier, or any officer or soldier, should be brought to trial by court-martial; or whether any *o* if any what, action is called for by the interests of the s is otherwise desirable to be taken. The court may be to furnish separate opinions upon several different points in the case,[2] and also to give its *reasons* for its opinions.[3] ordered to render an opinion upon a specific subject, or tain particular effect, it should confine itself strictly to th it cannot assume to express an opinion upon a different r to a different effect without transcending its authority an ing liable to censure.[5]

Dissenting opinions. Though it is *the court* which upon to give an opinion; *i. e.*, though it is contemplated opinion given shall be the opinion of the court; yet as the of a court of inquiry is not a *judgment*, it is not deeme necessary that the same, as rendered, should be unanin single, nor is the fact that the majority concur in a certain regarded as precluding, (as in a case of a court-martial,) pression of their dissent by the minority. When a joint

1. In the cases both of Gen. Dyer and Gen. Howard, the cha transactions dated back beyond the period of the statutory limi

2. See instances of opinions thus dispersed, in G. O. 13 of 1 40 of 1848; Do. 42 of 1849.

3. As in the case of the Inquiry in regard to the Proteus ex S. O. 241 of 1883.

4. DIGEST, 99.

5. Hough, (A.) 8; Harcourt, 174; Macomb, 93; O'Brien, Hart, 277; Coppée, 98.

be united in by all the members, dissenting opinions must
en or none at all; and in a case of dissent, it is not only
but desirable for the instruction of the reviewing officer,
e different conclusions arrived at by the different members
ially reported in the record.[1] But dissent of course is to
ded where practicable, and the members will always pref-
concur when they can do so without a sacrifice of just and
ible views.

dental remarks. Though the court may not volunteer
is not called for, it may, in connection with its opinion or
of facts, *remark* upon matters extraneous to the subject of
gation, but legitimately within its observation, for the pur-
bringing the same to the attention of the reviewing offi-
such, for example, as disrespectful or otherwise irregular
t on the part of the accused or accuser, or on the part of
l or a witness.[2]

VI. THE RECORDER.

Province and Duties. Although it is provided in Art.
it—"*A court of inquiry shall consist of*" certain officers
recorder,"[3] the special use and purpose of this officer is
as follows, *viz.*: "*to reduce the proceedings and evidence to*

The very disagreement indeed of intelligent minds is a material
portant fact in the case, and one of which the reviewing authority
ed to have the advantage in his consideration of and action upon
e." DIGEST, 99.

[2] Inquiry on the Cintra Convention, in 1808, the members who were
different opinion from the majority" were *required* "to record
ie proceedings their reasons for such dissent," and three of the
rs accordingly did so. Simmons § 339, and note; Hough, (A.)
e last author, (Precedents, 642,) cites another case in which two
five members of a court of inquiry gave dissenting opinions.
O'Brien, 291, in holding dissenting opinions not permissible,
ls upon a supposed analogy between the judgment of a court-
and the conclusion of a court of inquiry, which does not exist in
in law.

ough, 29; DIGEST, 99. And see G. O. 13 of 1837, as to the ani-
sions of the court of inquiry upon the reprehensible language
regard to each other by Gens. Gaines and Scott, the two officers
ied, the one in his address to the court, and the other in his
communications which were put in evidence.

ie Articles of the late code of 1806, (in force prior to June 22,
termed this officer "judge advocate," and "judge advocate or
r." The "judge advocate" of the court of inquiry in Gen. Dyer's

writing." So, in Art. 117, while it is provided that the members of the court shall be sworn to "*examine and inquire*," the recorder is required to be separately sworn to "*accurately and impartially record the proceedings of the court and the evidence.*" Thus, like the judge advocate of a court-martial, the recorder is clearly distinguished from the members, and the provision cited of Art. 116 has never been construed in practice as making him a part of the court.

He is further assimilated to the judge advocate in that he is empowered and required by Art. 117 to qualify the members by administering to them the prescribed form of oath; that by Art. 118, he is authorized to summon and examine witnesses; and that, by Art. 120, he is required to authenticate, with the president, the completed proceedings.

The principal regular *duties* of the recorder are—to keep the record of the court; to summon the witnesses, including those desired by the accused to be summoned, and to conduct in the main their examination under oath. He also assists the court in procuring such documentary or written evidence as may be required; but as Art. 91, relating to *depositions*, evidently contemplates the taking of the same mainly at least for use on trials by courts-martial, he will comparatively rarely be called upon to obtain testimony in this form.

Not a Prosecutor or Law-Officer. The recorder, however, unlike the judge advocate, is not a prosecuting officer, since the investigation is not a trial, nor will he properly assume the *rôle* or manner of a prosecutor. Further, he is not invested, like the judge advocate, with the capacity of adviser to the court. A court of inquiry, having confidence in the legal ability of its recorder, may indeed properly call upon him to assist it in examining the law applicable to the case before it, but this is no *duty* of a recorder; moreover it will not often come within the province of a court of inquiry to pass upon questions of law of a difficult or unfamiliar character.[1]

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case, (convened in 1868,) was authorized, in a Special Order from the War Department, to appoint an "assistant judge advocate." Published Record, p. 1.

1. In the exceptional case, however, of Gen. Howard, already noticed the court was specifically required to express an opinion not only upon the "moral" but upon the "technical and legal responsibility" of the officer.

VII. THE PROCEDURE.

The Meeting of the Court—Attendance of Parties. ıe court assembles at the place and time named in the Order ıvening it. If all the members do not attend on the first day, s customary for the others to adjourn from day to day till all present, with the recorder.

'he "party accused" is entitled, by Art. 118, to be present so as to take part in the examination of the witnesses, and in ctice he is permitted to be, and generally is, present from the inning and throughout the proceedings,[1] though his presence ot at any stage obligatory or essential. He is sometimes in-l, though rarely, *ordered* to be present,[2] and in such case must nd, though his absence may not affect the authority of the rt to proceed.

'o place the accused party in *arrest* prior to the convening of court, or pending its continuance, would be opposed to the sent usage of the service, and scarcely justified except in an reme case.[3]

'he party accused, or "whose conduct is to be inquired of," lso permitted to be accompanied and assisted by *counsel* if he ires it;[4] and a similar privilege is properly extended to an offi-whose conduct will be materially *involved* in the inquiry.[5] ıe *accuser*, where there is one, has also generally been allowed be present[6] and with his counsel.[7]

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1. He should properly be furnished with copies of the convening Or-r, and other Orders if any, fixing or changing the time or place of meeting of the court.

2. Simmons § 335; Hough, 25, 437; James, 317; De Hart, 275. The rt has no power to command his obedience, but the commanding cer only. Simmons § 334; Griffiths, 133.

3. Hough, (A.) 8; Griffiths, 134; De Hart, 279; Lee, 83. So, in the y, the officer need not be put under suspension. Harwood, 163. The e of André was of course an exception: at the end of the proceedings, record states that he was "remanded into custody." In the early e of Major Wyllys, of our own army, Congress, in providing for a rt of inquiry, expressly directed that he be "arrested and remain in st" till it should further order, and, at the end of the proceedings, it cted that he be "released from his arrest." IV Journals, 625, 676.

4. See De Hart, 276; Benét, 182; Coppée, 99; Harwood, 163.

5. Proteus Court of Inquiry, pp. 2, 3.

6. Kennedy, 240; Hough, (A.) 8; De Hart, 276; Benét, 181. Gen. tt, as accuser, attended the court of inquiry in the case of Gen. Pillow, Mexico, in 1848.

7. De Hart, 276. Benét, 181–2; Coppée, 98. In Gen. Dyer's Case,

Challenge of Members. The full court being in attend the convening Order is read, and the accused, or interested p is afforded the same opportunity of challenge as upon a tri court-martial. To this privilege indeed he is not legally ent since, by the terms of Art. 88, it is only "members of a martial" who "may be challenged by a prisoner." In justice, however, to the party, and with a view to an imp inquiry, such privilege is now always extended in our ser

In the special case of Gen. Howard, it was, as has been expressly provided by Congress that the accused shoul *allowed the same right of challenge as allowed by law in tri court-martial;*" but this provision was only declaratory existing practice as established by usage, and was unnec to secure the privilege to the party.[2]

Wherever the opportunity of challenge is availed of, the ceedings had will be similar to those before courts-martial i cases, as fully set forth in Chapter XIV. If a challenge t of a court of three members is allowed, it will in general b ter to adjourn and await the action of the convening auth since a court of two members, though legal, does not permi majority vote in a case of disagreement.

Organization, Sittings, &c.—*Administering of oath.* Such objections to members as have been made, (if being disposed of, the members and recorder are sworn acc to the form and in the manner set forth in Art. 117.

Obligation of secrecy. The oath, it may be remarke poses upon neither members nor recorder any obligation of s similar to that enjoined by their oath upon the member judge advocate of a court-martial; so that the opinion of the may be divulged without any violation of the oath as presc But, in law, the opinion of a court of inquiry is assimilated judgment of a court-martial in that it is a confidential and leged official communication addressed to the convening aut

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as also in Gen. Swaim's, the counsel of the accusers constantly att and took upon themselves the *onus* of making good the charges.

1. See Macomb, 94; O'Brien, 292; De Hart, 278; Benét, 181; C 98; Harwood, 163. The privilege was recognized as far back as inquiry in the case of Gens. Scott and Gaines in 1837.

2. This was admitted in the debate in both Houses of Congress. Rec., Nos. 38 and 40, 1874.

intended as a basis for his action alone, and it is readily per-
ed that a disclosure of such opinion before such action was
en might, (especially in a case where the court had been sit-
g with closed doors,) seriously embarrass the commander or
President in his disposition of the case, and perhaps materially
judice the interests of the accused party in the event of a trial
ng ordered.[1] It has therefore been held both by English and
erican writers[2] to be highly unmilitary and indecorous for the
nbers or judge advocate of a court of inquiry to discover, either
he accused or other person, the opinion or recommendation of
court, without the authority of the convening official or before
same is published in orders.

he oaths having been administered, the court is organized for
inquiry.

Whether session to be open or closed. Before, however,
ring upon the investigation, a question generally to be de-
ined is, whether the court shall sit with open or closed doors.
rts of inquiry, instituted as they are to assist by their researches
judgment of the President or the military commander, and
ing reports addressed as confidential communications to his
retion, would appear from their very nature and purpose to
roperly close courts.[3] Admission to them, in the absence of
atory regulation on the subject, is declared to be, strictly, not
ight.[4] But from an early period these courts, even in Eng-
l, have sometimes been open;[5] and, in *our* law, Art. 118 pro-
s for the admission of the accused and the witnesses, while,

Home *v.* Bentinck, 2 Brod. & Bing., 130, 164; Hough, 26; Clode,
., 199; De Hart, 280; Benét, 182; Harwood, 168.

See authorities cited in last note; also Hough, (P.) 653; Hughes,
; O'Brien, 291.

"These courts being held for the purpose of obtaining informa-
upon which an ulterior decision is to depend, are necessarily close
ts." Kennedy, 240. "All courts of inquiry are inherently close
ts." Hough, (P.) 645. And see Simmons § 337; Clode, M. L.,
Benét, 182; VIII Opins. At. Gen., 346.

"Defendants generally, and auditors and spectators occasionally,
access by grace and not of right." Hough, (P.) 645. And see
authorities cited in last note.

The Inquiry on the Cintra Convention was closed for the first two
On the third day it was opened, a minute being made in the
ngs that—"the guard being withdrawn, strangers are allo
." See Hough, (A.) 11.

by custom, the accuser,[1] the counsel of both parties,[2] an necessary clerks are permitted to be present. From this it a short step to admit the public, and the result is that, wi courts of inquiry, unless otherwise instructed in Orders, are i eral held as open courts.[3] It is indeed always competer proper for the convening authority to direct, in the conven a supplemental Order, whether the court shall be open or c But if—as is usually the case—the Orders are silent on th ject, the court is empowered to decide the point for itself b or, without raising the question, to go on sitting with oper from the beginning.[5] In a case where the result of the ir as it is developed in the course of the testimony, is sucl make it improper or impolitic that the court, originally should continue to be so, the doors will properly be closed the rest of the investigation,[6] all persons being excluded those entitled or privileged by law or usage to be present, a witnesses being admitted separately.[7] Of course, upon th deliberation, or where it is desired to consider without pu some interlocutory question, the court, if open, is cleare the doors are closed, in the same manner as in the case of a martial.[8]

Hours of session. A court of inquiry, (in the abse special instructions on the subject,) may sit 'without reg hours,' beginning and ending its daily sessions at such ho may be convenient for itself and the parties interested.[9]

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1. See *ante*, p. 745.

2. See *ante*, p. 745.

3. Macomb, 92; O'Brien, 291; De Hart, 276; Harwood, 163; Opins. At. Gen., 346; Lee, 82; DIGEST, 97. In the recent case of Swaim, the court, (p. 27,) voted to sit with open doors.

4. Hough, (A.) 11; Do., (P.) 639; Simmons § 339. Griffiths De Hart, 276; VIII Opins. At. Gen., 229.

5. See De Hart, 276; Benét, 182; Coppée, 99; Harwood, 163.

6. See Hough, 26; Macomb, 92; De Hart, 276; Harwood, 163; Opins. At. Gen., 347.

7. Hough, (P.) 640.

8. "Generally the court sits with open doors except when deli ing and voting." O'Brien, 291.

9. De Hart, 279; Benét, 182; Coppée, 99. In this connection, H (Practice,) 137, observes—"Though Sunday is not a day for si still there may arise cases requiring a court to sit on Sunday."

ovision of Art. 94 prescribing certain fixed hours applies only "proceedings of *trials*."

Adjournments. The granting of "*continuances*," as such, is, Art. 93, in substance restricted to occasions of trials before irts-martial. A court of inquiry, however, may, from time to ie during an investigation, grant or take such adjournments may be expedient and reasonable.[1]

Keeping of order—Contempt. The presiding officer acts :he organ of the court, and keeps order as in the case of a court-rtial. But courts of inquiry, having no original judicial au-rity, and not being embraced within the description of Art. which applies in terms only to courts-martial and cannot, as enal statute, be enlarged by implication, are not empowered punish, as for a contempt, persons guilty of disrespect, disor-, or violence in their presence.[2] Where, therefore, witnesses others misbehave at a session of a court of inquiry, while the irt may cause them to be removed if desirable, it can procure :m to be punished only by reporting the case to the convening thority or local commander, or to the civil authorities as the ;e may be.[3] In the event of a trial of the offender, the mem-rs and recorder, or any of them, will properly testify as pros-iting witnesses.[4]

The Investigation and Evidence—*Entertaining of iarges, reports, &c.* Upon its organization, the court com-only proceeds at once to the matter of the inquiry, which it has :en sworn to make truly and impartially "according to the evi-:nce." Not unfrequently, as a starting point of the investiga-on, reports, correspondence, books, &c., or charges—which will :operly be specific, but need not be in a technical form[5]—are

1. In the Order convening the court of inquiry in the case of Gen. iell, the court was specially authorized to "adjourn from place to ace as may be desirable, for the convenience of taking testimony."

2. See DIGEST, 98, and note. The law on this point is misappre-nded by De Hart, (p. 279,) and Benét, p. 182.

3. As to witnesses, Clode, (M. L., 198,) correctly says: "the court n no power to punish them for contumacy or silence."

4. See Delafons, 53-4; Hough, (A.) 6.

5. See Hough, (A.) 8; Maltby, 137; De Hart, 280; also G. O. 42 of 49, (case of Ast. Surg. Byrne,) where there were ten specific charges eferred in the form of statements of fact. It is observed by Maltby:—

laid before the court, either as referred to it directly by t
vening authority, or furnished to and introduced by the r
Even though formal charges be offered, there is made, as
indicated, no *plea*. The accused, however, may take occ
state—if such be the fact—that he admits certain alle
thus simplifying the investigation.[1]

Taking of testimony. The evidence is now entere
and, before courts of inquiry, the documentary evidence es
is often very considerable. The examination of the wit
conducted substantially as before courts-martial;—the
availing himself, so far as desired, of the right recognized
118 to examine and cross-examine, by introducing witn
his own, and interrogating, impeaching, or objecting to
nesses and testimony offered by the recorder; and the r
of the court putting such questions as may be deemed d
for the eliciting of the facts. Under the Act of March 1
c. 37, the accused, if he so elects, may take the stand a
ness, subject to cross-examination.[2] The inquiry not bei
dicial proceeding, the court is not called upon to enforce t
of the law of evidence so strictly as would be, in general,
martial;[3] but founded as such rules commonly are upon
as well as logic, it will ordinarily be safest and most equi
observe them.[4]

Independently of his examination as a witness, the ac
it need hardly be remarked—is not now subject, as forme
be interrogated by the court, or called upon for an explan

Closing argument. Upon the conclusion, however,
testimony, the accused, (after reasonable time for prepara

"A complainant is not bound to exhibit the same charges before
martial which he produced to the court of inquiry." Formal
have sometimes been preferred as the basis of the investigatio
cases in G. O. 65, 88, Fifth Mil. Dist., 1869.

1. See O'Brien, 291.

2. DIGEST, 482. And see Chapter XVIII.

3. Hough, (A.) 9; Kennedy, 240; Hughes, 162.

4. See D'Aguilar, 88; O'Brien, 291; De Hart, 332.

5. See Hough, (A.) 5, as to the procedure in the Inquiry on th
Convention; also Inquiry in case of André. This practice, howe
long been discontinued, as liable to criminate and unjust. See
344; Adye, 81–2; Hughes, 162; Hough, (P.) 640; Simmons
Coppée, 98.

sired,) may make, in his defence, such closing statement or gument as he may deem for his advantage.[1] The recorder, th the assent of the court, (for, not being prosecutor, he is, ictly, without *right* in the matter,) may thereupon present a mmary of the evidence with such remarks and arguments as e facts may properly suggest. Except, however, in cases of usual importance, while the accused or interested party comnly submits a written address, the recorder, unlike the judge vocate, does not in general formally reply.

Making up of report, &c., and record. The arguments, any, having been delivered, the court, if open, clears for deeration in the same manner as a court-martial. The recorder me remains with it, to assist it in recurring to the testimony d preparing its report. After such discussion as may be found fitable, the report is drawn up; the court, where elaboration is led for, taking such adjournments as may be found necessary fore their work can be completed. Although the court has en simply required to examine into and communicate the facts, is duty—it has well been remarked[2]—is not duly performed by rely returning the proceedings with the testimony as taken m day to day, but a formal summary at least of the material idence should properly be prepared and entered of record.

An *opinion*, if one has been required, will be added, and in such rm and with such detail as may most fully and succinctly coney to the convening authority the conclusions of the court.[3] As ready indicated,—while a majority vote will properly govern determining questions previously arising in the course of the roceedings, the minority are not obliged to yield to the majority the expression of the *opinion*. Thus where the members are able to unite in a single joint opinion, their dissenting or difrent opinions, duly subscribed, will be spread upon the record.

The completed record will then be authenticated, in the same rm as the record of a court-martial, and as prescribed by Art.

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1. Subject of course to the authority of the court to restrict a statent containing disrespectful or otherwise improper expressions. See apter XVII.

2. See Macomb, 92; O'Brien, 290–1; De Hart, 277–8.

3. Where formal charges have been investigated. have etimes been made. See case in G. O. (ch a proceeding, however, is quite unsuita

120,[1] and thereupon transmitted to the commanding officer or the President.

VIII. ACTION ON THE PROCEEDINGS.

Discretion of the Reviewing Authority. This official, upon the receipt of the record from the court, may, in the absence of any statutory direction, take action thereon at his discretion. If an opinion be given, it is in no respect binding upon him, being in law merely a recommendation, to be approved or not as he may determine. If, for instance, it is to the effect that sufficient grounds exist for ordering a court-martial in the case, he may either proceed to order one, or may decide that no further proceedings are required. So, where any other measure is suggested, he may adopt the view of the court, or may resort to action quite different, or may take none whatever. If action be taken, it need not be confined to strictly military means or methods. Civil or criminal liabilities may be disclosed by the testimony which should properly become the subject of an official communication on the part of the reviewing officer, addressed, through the Secretary of War, to the Attorney General, or more directly to the local authorities, with a view to suit or prosecution.

Revision by the Court. If not satisfied with the investigation, or with the report or opinion, the reviewing official may reassemble the court, in the same manner as a court-martial, and return the proceedings with directions, either to have the investigation pursued further and completed, or the report of the facts made more detailed and comprehensive, or the opinion expressed in terms more definite and unequivocal or more responsive to the original instructions, or to correct or supply some other error or defect.[2] The inquiry not being a trial but an investigation

1. A proper form, similar to that recommended for the record of a court-martial, is:—A true and complete Record. Attest: A. B., President: C. D., Recorder. Compare Chapter XXIII—"Authentication of Record." Formerly, all the members appear to have signed the record. In the case of André it was subscribed by all the fourteen members.

In connection with the subject of the making up of the record of a court of inquiry, the student is referred to Chapter XXIII on the subject of the Record of Courts-Martial.

2. It may here be noted that the class of errors affecting the *legality* of the proceedings, which may occur in records of courts-martial are not known as such to records of courts of inquiry.

ely, the court may properly be required, upon revision, to :ar witnesses or to take entirely new testimony, or it may do f its own motion without orders in connection with the re-)n.

court of inquiry would be chargeable with dereliction of · which should refuse to pursue an investigation or complete port of facts, thus ordered to be perfected. Such a court, ever, though it might be censured or severely criticized, could :ely be otherwise called to account for declining to modify *pinion*—provided it were expressed in temperate and proper uage.

romulgation. The reviewing authority, having taken final)n upon the report or opinion, proceeds, regularly, to publish, General Order, in whole or in part, or in substance, the re- of the court upon the subject of the inquiry, with the opin- (if any,) and the determination had or action taken thereon. n considerations, however, of policy or justice, the President ommander may, in his discretion, delay to publish, or omit ;ether to publish,[1] the report, &c., or may publish the result e—as, for example, that it is determined that no further pro- ings are called for in the case.[2]

IX. THE PROCEEDINGS AS EVIDENCE.

efore a Court-Martial. It is provided by Art. 121 that— *he proceedings of a court of inquiry may be admitted as evi- :e by a court-martial, in cases not capital, nor extending to the issal of an officer:* provided, *that the circumstances are such ! oral testimony cannot be obtained.*" By the term "proceed- s" is evidently had in view chiefly the testimony; and the ision contemplated doubtless was that of a trial by court-mar- of a case which had previously been investigated by a court uquiry. In such a case it could not prejudice the interests of ice, but the reverse, to admit in evidence the sworn testimony itnesses who had recently testified before the court of inquiry whose personal attendance at the court-martial could not by

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As was done with regard to the proceedings in the case of Gen. l, which, as noted *ante*, were never promulgated in Orders.

As in the case of the charges against Gen. Martindale. See G. O of 1862.

reasonable diligence be secured. Indeed a resort to su mony might be the only means of avoiding a failure o The admission of such evidence might also be advanta certain other occasions—as where, for example, an offic dier was brought to trial by court-martial on a charg swearing as a witness before a previous court of inquir was desirable to prove his testimony at the latter pr given.

As to the cases *excepted* from the application of the Ar "capital" cases and cases "extending to the dismissal cer," it is to be said that by the former are meant cases offences which, by the Articles of war, would be capitall able[1] if found by the court, and, by the latter, cases of a fences of officers for which the penalty of dismissal is m datory upon conviction.[2]

It is to be remarked that the admission of evidence r in the Article is an admission of evidence *on the merits* of *i. e.* in proof of the offence charged.[3] Thus it was held Advocate General Dunn that the proceedings of a co quiry would be admissible in evidence, irrespective of th and in the cases excepted as well as in any other, when ject was, not to prove or disprove a charge, but to imp evidence of a witness on the trial by showing that he h a different statement on oath before the court of inquir

The proceedings of the court of inquiry will properly b before the court-martial either by the original record o quiry, or by a copy of the same certified by the Judge General, or other official in whose custody the original r porarily be.

Before a Civil Court. The question of the admissi evidence of the record of a court of inquiry at a trial befo court was determined in the negative in England by t known case of Home *v.* Lord Bentinck.[5] This was a

1. As to the definition of the term "capital" as used in the of war, see Chapter XX—"Death."

2. See DIGEST, 99–100.

3. See DIGEST, 99; G. O. 33, Dept. of Arizona, 1871.

4. DIGEST, 100. And see this opinion published as approve President in G. C. M. O. 40 of 1880.

5. 2 Brod. & Bing. 130.

ıught in the Court of King's Bench by a Lieut. Colonel of the itish army, whose alleged misconduct had been investigated a court of inquiry, against the president of the court, for a libel imed to be contained in the opinion. The plaintiff presented evidence the original record of the court, which, upon objection the defendant, was ruled out as inadmissible: a copy of the ord was then offered with a similar result. Upon an appeal he Court of Exchequer Chamber, these rulings were sustained the ground that the opinion of the court constituted a privi-ed communication. Dallas, C. J., observed:—"What was the ort in its very nature but a confidential communication, in ısequence of a direction by the Commander-in-chief, for the ɔrmation of his own conscience in the exercise of his public y." And he holds that—"upon the broad principle of state icy and public convenience, * * * these matters, secret their natures and involving delicate inquiry and the names of sons, stand protected."[1]

This ruling would be applicable to a similar case at American r. But in our military practice the results of the investigations courts of inquiry are in the majority of cases promulgated in lers, and in a case in which such a publication had been made : report or opinion published could not be held to be a privi-ed communication, though the testimony or proceedings not blished might still be so considered.

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1. The Chief Justice further holds, (p. 162,) that it would have been duty of the court, considering that the document was a secret com-unication, not the property of the party holding it but of which he was rustee on behalf of the public, to interpose and prevent its admission, en if no objection had been raised,—in the same manner, he adds, as tnesses "are not to be asked the names of those from whom they re-ive information as to frauds on the revenue." And with this case, see ıwkins *v.* Lord Rokeby, 8 Q. B. 255; Manual, 174, 176; also—gener-y—PART III, *post.*

CHAPTER XXV.

THE ARTICLES OF WAR SEPARATELY C(SIDERED.

The history and authority of our Code of Articles of Wa been reviewed in a previous Chapter. Certain specific Ar to wit Arts. 63, 65 to 98, and 100 to 121, as also certain other statutes properly classed with the Articles, *viz.* Secs. 1203, 1230, 1361, 4824 and 4825, of the Revised Statutes been sufficiently construed in connection with the variou jects already examined in this treatise. We now proceed t sider such of the remaining Articles (and kindred enactme are deemed to call for construction and remark.

Forms of CHARGES of the offences made punishable t several Articles will be given in the Appendix. It neec here be said in general that the specification under any c should not merely consist in a bald repetition of the phrase of the charge or of the name of the offence, but should set in full the particulars—words, acts and circumstances—in the offence—Disrespectful conduct, Disobedience of Orders, muster, Mutiny, Misbehaviour before the enemy, Breach rest, Conduct unbecoming an officer or a gentleman, Condu the prejudice of good order and military discipline, or oth the case may be—is alleged to have consisted.[1]

I. THE INTRODUCTORY SECTION.

The Code of Articles is prefaced, in the Revised Statute the following general provision:

"SECTION 1342. *The Armies of the United States shall be erned by the following rules and articles. The word officer, as*

1. See Chapter X—"THE CHARGE."

herein, shall be understood to designate commissioned officers; the word soldier shall be understood to include non-commissioned officers, musicians, artificers, and privates, and other enlisted men, and the convictions mentioned therein shall be understood to be convictions by court-martial."

Effect. Of this Section, the *first clause* is substantially identical with that which introduced the Articles of 1806; its original being found in the preliminary declaration of the two earlier codes of 1775 and 1776. The *second clause* is new, and was designed to set at rest the question, (which had been considerably discussed,) whether under the term "officer," as employed in the Articles, and particularly in the old 9th, (now 21st,) Article, non-commissioned officers could properly be held to be included.

It may be remarked that within the terms "officer" and "soldier," as here defined, are embraced all the purely military persons who are subject to the Articles of War and the jurisdiction of courts-martial, except only *Cadets*. This class, however, as a part of the Army,[1] are directly so subjected by the first and general clause of the Section, and indirectly by the operation of Sec. 1320, Rev. Sts., prescribing their oath.

II. THE FIRST ARTICLE.

[SUBSCRIBING OF ARTICLES.]

"ART. 1. *Every officer now in the Army of the United States shall, within six months from the passing of this Act, and every officer hereafter appointed shall, before he enters upon the duties of his office, subscribe these rules and articles.*"

An Obsolete Provision. This provision, derived from a similar Article of the code of 1775, is now practically a dead letter, officers of the army being never required manually or otherwise to "subscribe" the Articles of war. This article may indeed be regarded as superseded in the existing law by Sec. 1757, Rev. Sts., which,—as enlarged by the Act of May 13, 1884,—prescribes an *oath of office*, to be taken alike by the civil, military and naval officers of the United States, in which the party

1. See Sec. 1094, Rev. Sts.

swears, among other things, that he will "well and faithfully discharge the duties of his office."[1]

III. THE SECOND AND THIRD ARTICLES.

[ENLISTMENT.]

"ART. 2. *These rules and articles shall be read to every enlisted man at the time of, or within six days after, his enlistment, and he shall thereupon take an oath or affirmation, in the following form: 'I, A. B., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles of war.' This oath may be taken before any commissioned officer of the Army.*

"ART. 3. *Every officer who knowingly enlists or musters into the military service any minor over the age of sixteen years without the written consent of his parents or guardians, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military or naval service of the United States, or any person who has been convicted of any infamous criminal offence, shall, upon conviction, be dismissed from the service, or suffer such other punishment as a court-martial may direct.*"

SECOND ARTICLE.

Effect of the Article—The Oath. This Article is an incorporation of the old Art. 10 of 1806, (derived from Art. 1, Sec. III, of 1776,) with s. 11 of the Act of Aug. 3, 1861, c. 42.

It is quite clear from this Article, which is directory merely, that neither the reading of the Articles, nor the administering of the oath, is intended to constitute an *essential* part of an enlistment: it is indeed evidently contemplated that the enlistment may be complete without either, since both may come "*after*" it.[2]

1. Formerly the officer's oath, as prescribed by the Act of Jan. 29, 1813, c. 16, s. 13, was the same as that administered to enlisted men. Forms of an oath of *allegiance* required to be taken by officers during the Revolutionary War are found in 1 Jour. Cong., 525; 2 Id., 427-8.

2. DIGEST, 1. The counter view, as indicated by O'Brien, (p. 86) and in Tyler *v.* Pomeroy, 8 Allen, 492, as to the construction of the

The oath here prescribed, however, is, *in practice*, administered upon enlistment, and, as incorporated in the formal enlistment paper or certificate in use in our service, is subscribed by the party enlisting.[1] As thus taken, it serves as material *evidence* that a contract of enlistment has been entered into.[2]

The Reading of the Articles of War. As the party is made to swear in the oath that he will obey orders "according to" such Articles, and as the above Article specifically directs that the Articles shall be read to him before the oath is administered, it is clear that the reading also, (though not a requisite,) will properly constitute a feature of the ceremony of enlistment.[3] The Article not indicating by whom the reading is to be done, the duty will properly devolve upon the recruiting officer, who should either perform it himself, accompanying the reading with suitable explanations, or cause it to be performed by an intelligent non-commissioned officer.

Failure to comply with the injunction in regard to the reading of the Articles, (required also by Art. 128 to be repeated "once in every six months,") as constituting a ground for the mitigation of a sentence, has been noticed in Chapter XXI.

THIRD ARTICLE

Origin. This provision, which first appears as a separate Article of war in the code of 1874, is a compact condensation of the Acts of March 2, 1833, c. 68, s. 6, and March 3, 1863, c. 75, s. 1, (prohibiting the enlistment and service of persons convicted of felony or crime,) and the Acts of July 4, 1864, c. 237, s. 5, March 3, 1865, c. 79, s. 18, and May 15, 1872, c. 162, (prohibiting the enlisting, &c., of persons of the other classes specified in the Article.)

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rticle, (as expressed in the code of 1806,) is not concurred in. Of the *resent* form, certainly, of the Article, the interpretation given in the xt is the reasonable one.

1. Compare the description in Art. 4—"enlisted man, duly sworn." is well said of this form of oath by O'Brien, (p. 86,) that it "contains brief synopsis of the whole duty of a soldier."

2. DIGEST, 1. And see *post*—"Enlistment in general."

3. In all cases of *original* enlistment, the fact might well be specified, the certificate of the recruiting officer on the enlistment paper, that he Articles of war had been read to and understood by the recruit—here such was the fact.

Construction—*"Knowingly."* As has been held by the Judge Advocate General,[1] it is not essential, to render an officer amenable under this Article, that it should be shown that, in enlisting a person, he had positive and absolute knowledge that he belonged to one of the designated classes. If from the appearance, manner, or statements of the party, or other facts previously communicated to the officer or developed in connection with the enlistment, it is reasonably inferable that the party is within one of the descriptions, the officer will in general properly be charged with the knowledge requisite to constitute him an offender.

"Musters into," &c. The term "*muster-in*," though sometimes confounded with *enlistment*, is only properly employed to designate the formal admission, (upon inspection, administration of the oath, &c.,) into the U. S. service, of militia or other State troops, or troops raised under State authority. The term is, strictly, without application to the army proper, into which persons are admitted only by enlistment and separately.

"Insane person." Insanity, unless exceptionally patent, is not a condition to be readily detected by a recruiting officer. The question of the mental soundness of a person offering himself for enlistment is rather one for the medical examining officer, and where he certifies, according to the form on the enlistment paper, that the party is "free from all mental infirmity," the recruiting officer will be safe in treating with him as sane.

"Intoxicated." This term properly includes a person so far under the influence of an intoxicating drink *or drug* as not to be able *fully* to comprehend the nature of his act or the obligation thereby assumed.[2]

"Deserter." This term signifies a person in the status of a deserter at the time, *i. e.* one who is either a deserter at large, or who, if in military custody, is unpunished or unpardoned, at the time of the enlistment. Soldiers who, having deserted, have been tried, sentenced, and fully punished for their offence, or whose sentences have been remitted, are no longer deserters in law or fact, and may legally be, and, in practice, not unfrequently

1. DIGEST, 2.
2. See DIGEST, 2.

, enlisted into the army. So, a deserter whose offence has been ctically condoned, and who has been constructively pardoned, his being restored to duty without trial by competent author- under par. 218, Army Regulations, may be enlisted without olation of the present Article.

Any infamous criminal offence. An "infamous" crime generally been held to be one which will, by law, subject the on committing it to an infamous punishment, or will disqual- iim from being a witness. But as disqualification of witnesses .ccount of infamy is in a great measure done away with,[1] the 1 'infamous crime,' as here used, may properly be regarded crime which legally subjects the offender, upon conviction, ie punishment of death or of confinement in a penitentiary. : word "*any*" is deemed to include a conviction by any State 'ell as United States court. It may also be held to include a viction, by a court-martial, of a crime which, if committed 1 civilian, would have subjected him to an infamous punish- it—in other words a crime such as is designated by Art. 97.

ENLISTMENT IN GENERAL.

In this connection it will be convenient briefly to review the v pertaining to the general subject of enlistments in our army.[2]

Constitutional Provision—Power of Congress. The ginal authority for the enlisting of persons in the military vice is to be found in the clause of the Constitution[3] by which ngress is empowered "to raise armies." The Constitution es not indicate the manner in which the power shall be ex- ed,[4] but leaves the whole subject without limitation to the dis- tion of Congress.[5] No power whatever over the same is con-

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- See Chapter XVIII—"Infamy;" Wharton, Cr. Ev. § 363, note.
- Upon the history of enlistment in the British Army, see Clode, 2 L., ch. XV; Manual, ch. IX; Tyler *v.* Pomeroy, 8 Allen, 486–491.
- Art. 1, Sec. 8, par. 12.
- Kerr *v.* Jones, 19 Ind. 354.
- "Its control over the subject is plenary and exclusive." Tarble's e, 13 Wallace, 408. And see In the matter of Disinger, 12 Ohio St. The Constitution, in conferring upon Congress the power to raise ies, authorized it "of course to pass laws necessary for that pur-

Supreme Court in Tarble's Case,[5] "can determ
shall be raised, whether by voluntary enlistme
Except, however, upon one occasion in our l
mode is the only one which has in fact been
were the proportions of the late war of the re
gent was the need of troops, that Congress was i
in the Act of March 3, 1863, c. 75, the power o
force by an enrolment and draft of citizens
ages of 20 and 45; and under this Act and the
thereto, a mild system of conscription went c
voluntary enlistments during the last two yea

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pose." Com. *v.* Barker, 5 Bin. 428. And see Phe
287–8.

1. "By the Constitution, the power to raise arr
sively in Congress; and the executive department,
of Congress into effect, must conform its action t
ferred on it." IV Opins. At. Gen., 537. "The l
the Constitution, power to raise a single soldier.
lative power, can alone empower him to do so."
Ind. 354.

2. Tarble's Case, 13 Wallace, 408. And see K
354.

3. "It is in the power of Congress to declare w
* * * to say who shall serve in the army." Rei
(N. S.) 335, 337. Congress may designate person
or condition," as those "who shall constitute the a
of Disinger, 12 Ohio St. 261. And see In the ma
dict, 409; Tyler *v.* Pomeroy, 8 Allen, 493; In the n

ıer than to observe that its constitutionalty has been fully ned by the Courts,[1] this mode of raising armies will not here :marked upon.

Their Composition. In declaring what persons shall conte the army, Congress—as already indicated—is alone author- to determine all such details as nationality, race, age, physical moral qualifications, &c.[2]

ıtionality. The legality of the enlistment of aliens is recog- l by the common law and the law of nations,[3] and the employ- t in their armies of foreign mercenaries has been resorted to .l the European powers.[4] With us, it is settled law that Con- s may, and does, by not in terms restricting to *citizens* the ɔns eligible to enlistment, authorize the enlistment of aliens habitants who have not been naturalized.[5] In Sec. 2166, Rev. indeed, the legality of the enlistment of aliens is expressly gnized by a provision "*that any alien of the age of twenty-one s and upwards, who has enlisted or shall enlist*" in our armies, , upon being honorably discharged therefrom, be admitted to me a citizen without the performance of certain conditions ired in other cases of aliens.[6]

ace—Indians. Although Indians are not, in general, citi- ,[7] the authority to employ them in the military service seems

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Kneedler *v.* Lane, 45 Pa. St. 238; Booth *v.* Woodbury, 32 Conn. Tarble's Case, 13 Wallace, 408. And see U. S. *v.* Scott, 3 Wallace, U. S. *v.* Murray, Id. 649; Allen *v.* Colby, 47 N. H. 544; Harvey *v.* ıam, 42 Vt. 291; Reed *v.* Sharon, 35 Conn. 191. In Sheffield *v.* 107 Mass. 284, it is observed by the court, that the term "enlisted" luly enlisted," as employed in the Articles of war, "necessarily in- s soldiers who have been drafted as well as those who have entered :rvice as volunteers."

In the matter of Riley, 1 Benedict, 410; In the matter of Disinger, ıio St. 261; In the matter of Beswick, 25 How. Pr. 151.

III Opins. At. Gen., 671; VI Id., 476.

See U. S. *v.* Wyngall, 5 Hill, 22–25; U. S. Cottingham, 1 Rob. 635.

J. S. *v.* Wyngall, *ante*, 16; U. S. *v.* Cottingham, *ante*, 615; VI . At. Gen., 474, 607; IV Id., 350; O'Brien, 86. By the conscrip- ıws, (Acts of March 3, 1863, c. 75, s. 1, and July 4, 1864, c. 246, foreigners, who had only declared their intention to become citi- nder the naturalization laws, were authorized and required to be :d and made subject to draft.

;ee DIGEST, 105.

Indians are not citizens of the United States, but domestic

Shawnees and Delawares, was raised and held in
months.[2] In the recent war three regiments, de
First, Second and Third Indian Regiments,[3] (or
Guard, Kansas Infantry,") were recruited and or
under the general authority of the Act of Cong
1861—"to authorize the employment of Volunt
dians were also enlisted into other regiments of
the 6th, 9th, and 14th regiments of Kansas Volu

In the Act of July 28, 1866, c. 299—"to fix the
establishment," at the end of the war, the Presid
ized by Congress "to enlist and employ in the
Indian country a force of Indians, not to exceed c
act as *scouts*, who shall receive the pay and allow
soldiers, and be discharged whenever the nec
further employment is abated, or at the discretio
ment commander." Under this provision[5] such

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jects." They may, however, be naturalized as citizen
Act of Congress or a treaty. VII Opins. At. Gen., 74

1. See 2 Jour. Cong., 465, 468–9.

2. See Act of Sept. 28, 1850, c. 83.

3. Volunteer Register, Part VII, p. 364–8.

4. See XII Opins. At. Gen., 246, where it was held
of these regiments were entitled to bounty in the same
volunteers. [Of these Indian troops Atty. Gen. Stan
this opinion that "it abundantly appears," from the
general and other officers who had commanded them, t
in various States, did good service, took part in many

our service, as a force indispensable to the success-
›n of warfare with hostile Indians.

›f *African descent.* No Act of Congress, as ob-
ttorney General Bates,[1] has ever "prohibited the
free colored men into the national military service."
ıct this class of persons were enlisted and served as
in the Revolutionary war[2] and the war of 1812.[3]
›ption of the Constitution, however, it was not till
the recent rebellion, that their employment as sol-
be expressly authorized. Then, under the Acts of
2, c. 195, s. 11; July 17, 1862, c. 201, s. 12; and of
2, c. 78, s. 10, they were employed, first as laborers,
d cooks, and presently as enlisted soldiers, until, by
he war, there had been organized and added to the
ne hundred and forty regiments of colored troops.[4]
›rtion of these men had but lately been slaves, but
n of one of the Acts cited, (s. 13 of July 17, 1862, c.
leclared that every slave, upon being received into
ervice, should "forever thereafter be free." The
nancipation proclamation followed on Jany. 1, 1863,
ıl application to all slaves.
of the war, in the peace establishment as fixed by
ly 28, 1866, two cavalry and four infantry regiments
diers were provided as a part of the permanent mil-
he four infantry regiments have since been consol-
vo.[5]

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s., 57. The Act of December 10, 1814, uses the term
description of the class of persons made eligible to enlist-
word "white" is not to be found in any statute on the
ısertion in the Army Regulations from 1821 to 1861 was
.nce of *legislation* by an executive department.
Cong., 238; Sparks' Writings of Washington, vol. III,

›pins. At. Gen., 58; I Id., 603.
Register, Part VIII. Even the Confederate States
uthorized, near the end of the war, the raising of "com-
› soldiers." Official communication of Confederate Sec-
to Major Pegram and others, A. & I. G. O., March 15,

ct of March 3, 1869, c. 124. (Sec. 1108, Rev. Sts.)

control and the benefit of their services.[3] In ge
time of peace, Congress has allowed to the pare

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1. "It cannot be doubted that the power to enlis
service is included within the powers delegated to Con
stitution." U. S. *v.* Bainbridge, 1 Mason, 80. And
art, Crabbe, 266; In the matter of Riley, 1 Benedict,
Birge, 30 Conn. 438; Com. *v.* Barker, 5 Bin. 426;
Disinger, 12 Ohio St. 261–2; U. S. *v.* Blakeney, 3 G
Morris, 1 Philad. 381; IV Opins. At. Gen., 607; VI I
A minor's contract of enlistment is held valid at con
v. Rotherfield Greys, 1 B. & C. 345; Com. *v.* Gambl
U. S. *v.* Blakeney, 3 Grat. 411; U. S. *v.* Lipscomb, 4

2. See Acts of April 30, 1790; Mch. 3, 1795; Mch. 1
1812; Jany. 20, 1813; Jany. 29, 1813; Dec. 10, 1814; F
4, 1864. In all these statutes, except the last, the *min*
listment is fixed at 18 years; in the last, enlistments, (
persons as young as 16, are legalized. (The latter a
lished as the minimum early in the war of the Revoluti
of Congress of Jany. 17, 1776. See 1 Jour. Cong., 23
ney, 3 Gratt. 441.) In the Acts cited the *maximum* age
at thirty-five, (Mch. 16, 1802;) forty-five (Jan. 11, 18
and Jan. 29, 1813;) forty-six, (April 30, 1790, Mch. 3, 1
1796;) and fifty, (Dec. 10, 1814.) The Commissioner
of the Statutes decided that the provision of the Act o
maximum at 35 years, was still unrepealed; and, up
and that of the Act of July 4, 1864, as establishing a min
it as the existing law that recruits, at enlisting, must be
of sixteen and thirty-five years;" and it was so *enacte*
the Revised Statutes.

3. "Congress may constitutionally authorize the e
service of any minors, independent of the private consen

ny, of an unemancipated minor, the right to withhold consent and thus prevent, his enlistment.[1] At certain periods, how-:, when the public interests have appeared to require it, such sent has been in express terms or by implication dispensed ı, and enlistments without it thus legalized.[2]

: is thus perceived that the rules of the common law govern- the contracts of infants, *viz.*—that the same, (except when neficial," as where made for supplying the necessaries of life,)

Consent is expressly required for the enlistment of minors by the ; of March 16, 1802, Jany. 11, 1812, Jany. 20, 1813, Jany. 29, 1813, :. 28, 1850, and by the existing law—Act of May 15, 1872, incor- .ted in Sec. 1117 of the Revised Statutes.

ı the earlier Acts the consent of the "*master*" was required to the ıtment of an "*apprentice.*" Acts of Mch. 16, 1802; Jany. 11, 1812; ·. 20, 1813; Jany. 29, 1813. And see Act of Dec. 10, 1814; Resolu- of Congress of Jany. 30, 1776. See also the early cases of Com. *v.* ter, 5 Bin. 423; State *v.* Brearly, 2 South. 555; Com. *v.* Harrison, 11 s. 63, which were cases of applications for the discharge of appren- enlisted without the consent of their masters. A more recent in- ce is Reilly's Case, 2 Ab. Pr. (N. S.) 334.

'here the statute, as in the case of the existing law, requires the con- of the "*parents*" of the minor, the consent alone of the father, if he the legal custody of the child, will be sufficient, though the mother ving. Where the father is deceased, and there is a mother entitled ıe legal custody, her consent is essential and sufficient. *Ex parte* on, 1 Murph. 336; Com. *v.* Callan, 6 Bin. 255. In Com. *v.* Camac, & R. 88, it was held that a consent given in writing five or six days - the enlistment was sufficient, as duly *ratifying* the engagement of ninor. Consent is "a virtual emancipation" of the minor during erm of his enlistment, and entitles him to "receive and control" pay, &c., as may accrue to him from the government under his ract. Baker *v.* Baker, 4 Vt. 57.

'hile the consent of the parent or guardian of an *alien* is required e same manner as that of any other enlisted minor, provided he has ·ent, &c., resident in this country, (Com. *v.* Harrison, 11 Mass. 63,) otherwise if his parent, &c., is not domiciled in the United States. ıe words of Attorney General Cushing, to make the consent essen- :o the contract, the alien "must have a parent or guardian whose ɔrity, as such, over the person of the enlisted minor is known and ;nized as valid by the law of the place where the enlistment is :." VI Opins., 610.

See the Acts of Dec. 10, 1814, Feb. 13, 1862, Feb. 24, 1864, and July 54, as construed and remarked upon in Phelan's Case, 9 Ab. Pr. Lanahan *v.* Birge, 30 Conn. 445; XII Opins. At. Gen., 265; and n *In re* McDonald, Lowell, 100; In the matter of Kimball, 9 Law 500. And see further, in this connection,—In the matter of Riley, ıedict, 408; In the matter of Beswick, 25 How. Pr. 152; Reilly's 2 Ab. Pr. 337; In the matter of Gregg, 15 Wisc. 479; *In re* Hig- 16 Id. 351; XIV Opins. At. Gen., 210.

are voidable upon the infant's coming of age and may then be confirmed or repudiated by him at pleasure; and further that such contracts, when for personal services, cannot be entered into without the concurrence of the parent, or person *in loco parentis*, if there be one, to whom such services are originally due,—have no necessary application to a contract of enlistment in the military service; the former having no application in any event, and the latter only where recognized by existing legislation.[1] For this is not like an ordinary contract between private parties: it is an engagement to serve the State, which is entitled to avail itself of the personal military service of any of its able-bodied citizens of whatever age, when needed for the public defence and welfare. This right, being exercised for the common good, must be paramount to all individual claims. Public policy requires that neither the rights at common law of the minor contractor, nor those of his parent, guardian, or master, shall be asserted against the United States, except in so far as they may have been expressly recognized and conceded by existing statute.[2]

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1. *In re* Gregg, 15 Wis. 481; U. S. *v.* Bainbridge, 1 Mason, 84; U. S. *v.* Blakeney, 3 Grat. 409; U. S. *v.* Cottingham, 1 Rob. 635. And see Lanahan *v.* Birge, 30 Conn. 444; Robert's Case, 2 Hall, Am. L. J. 195.

The doctrine that the enlisted minor may avoid his contract, on his coming of age while still in the service, has indeed been maintained in a few cases. See State *v.* Dimick, 12 N. H. 194; In matter of Dew, 25 Law. Rep. 540; IV Opins. At. Gen., 350. But these rulings are opposed by the great mass of authority.

2. "By the general policy of the law of England, the parental authority continues until the child attains the age of 21 years; but the same policy also requires that a minor shall be at liberty to contract an engagement to serve the State. When such an engagement is contracted, it becomes inconsistent with the duty which he owes to the public that the parental authority should continue, and it is therefore suspended." King *v.* Rotherfield Greys, 1 B. & C. 349–50. "The Government of the United States has the right, whenever it thinks the exigencies of the country require it, to command the services of any of its citizens, and it is the sole judge of that necessity. If it so determine, it may enforce its right to command such service," (through legislation of Congress,) "and thus *override* the usual and legal claims of parents and guardians." In the matter of Beswick, 25 How. Pr. 151. Especially in time of *war* is the claim of the parent, &c., to the services of the man to be subordinated to that of the Government. See In the matter of Disinger, In the matter of Kimball, *In re* McDonald—*ante*.

Some of the authorities take occasion to suggest that a minor's contract of enlistment may be sustained on the ground that it is a "beneficial" contract, or one for necessaries,—part of the consideration being certain rations, clothing, fuel, quarters, medical attendance, &c. See

onal Qualifications. It cannot be doubted that Con-
exclusively empowered, under its Constitutional authority
se and support armies," to prescribe what shall be the
l qualifications—physical, moral, intellectual, &c.—of
admitted into the military service. It has heretofore done
ecifying in several of the earlier statutes that such per-
ll be "at least five feet, six inches, in height,"[1] and that
ll be "effective and able-bodied men."[2] The former
n, however, was done away with by the Act of July 5,
ince which date there has been no statutory requirement
eight:[4] the latter qualification, as to physical efficiency,
sists as a part of the existing law on the subject.[5]
ess has also prescribed further qualifications, both *mental*
al, for persons entering the army, which are now collected
on 1118 of the Revised Statutes.[6]

t of Statutory Provisions as to Qualifications for nent. Here may properly be examined the question
the enlistment of a person not possessing one of the
tions, or possessing one of the disqualifications, speci-
Secs. 1116 to 1118 of the Revised Statutes, would be
ly void, or would be only unauthorized and so capable
ratified by the waiver and act of the government. In
is question was considered by the Supreme Courts of
rk and Virginia, in the cases of U. S. *v.* Wyngall[7] and

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nbridge, 1 Mason, 84; *In re* Gregg, 15 Wis. 480; Com. *v.* Ca-
& R. 90; State *v.* Brearly, 2 South, 562; also Com. *v.* Gamble,
R. 93; U. S. *v.* Blakeney, 3 Grat. 416; In the matter of Disin-
; U. S. *v.* Jones, 18 Howard, 95. But in general it has been
to support the contract upon the "*broader ground of public*
(Com. *v.* Gamble.)

the Acts of April 30, 1790; March 3, 1795; March 16, 1802. It
d in the first Act—"without shoes."

the Acts of March 3, 1799; March 16, 1802; Dec. 24, 1811; Jan.
Jan. 20, 1813; Dec. 10, 1814.

ressly repealing in this respect the provision of March 16, 1802.

subsequent fixing of the height, (at five feet, three inches,) by
egulation, (see par. 929 of 1863,) was a clear instance of legisla-
is matter is now regulated by "instructions issued from time
Par. 758 of 1881.

ec. 1116, Rev. Sts.

l see the Third Article of War.

ill, 16.

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U. S. *v.* Cottingham,[1] with reference to the terms of the May 16, 1802, and it was held that this statute, which, other things, indicated "citizens" as the class of persor enlisted, was directory, or one of "restrictory direction and that an enlistment of an alien was not illegal but objection might lawfully be waived and the enlistment and ratified by the government. Similarly, *the existing* contained in the Revised Statutes, relating to the persor ifications of individuals for enlistment is regarded as only,[2] and "not as necessarily making void" enlistmen classes of persons designated, "but as rendering them *merely*, at the option of the government."[3] In this vi cases of such enlistments, except of course where the reason of mental derangement or drunkenness, was witl legal capacity to *contract*, or is too young to properly military service, the government may elect to hold the s service, subject to any application for discharge which addressed by himself, or his parent, &c., either to the S of War or to a United States court.'[4] This constructio law has been in general followed in the practice of the partment, and is believed to be the only reasonable one the United States should be held to be precluded from an irregular enlistment where the disqualification did not or had ceased to impair the value of the soldier, who me had performed service, received pay, &c.;[5] or where the had committed a military offence and his trial by court-

1. 1 Rob. 631—a very instructive case. And see the analog of Com. *v.* Baker, 5 Bin. 427, *per* Tilghman, C. J.

2. In their original form, (see, especially, Acts of July 4, 18 and of March 3, 1865, s. 18,) Secs. 1116–1118 were in effect m *rections to recruiting officers*, &c., a non-compliance with which provided—should subject them to military trial and punishm now specifically enjoined in Article 3.

3. DIGEST, 249–250. And see In matter of Graham, 8 Jone 416; Cox *v.* Gee, Winst. L. & E. 131.

4. DIGEST, 250. In the recent case of *In re* Davison, 21 Fed. 618, the court expresses the opinion, *incidentally*, that enlistment 16 are "void."

5. Compare Holbrow *v.* Cotton, 9 Quebec Law Reports, 105, it is held that—"An informality in the enlistment of a soldier ca invoked by him as relieving him from military discipline while v rily serving with his corps."

d punishment were called for by the interests of discipline,—
ıuld be an unfortunate contingency and against public policy.

Enlistments in Contravention of Army Regulations. to army regulations, these, when full force is given them, can nothing more than executive directions;[1] and where a regu- ion prescribing a formality or condition to be observed upon istments is not complied with in making a particular enlist- nt, it is clear that the validity of the same is not so affected as entitle the party, because of such error or omission, to a dis- ırge, against the consent of the government. This was indeed cifically so ruled by Wayne, J., of the U. S. Supreme Court, a case on circuit in 1861;[2] and more recently it has been held a U. S. Court that an enlistment of a *married* man, in deroga- a of a regulation requiring, generally, that recruits should be narried, was not illegal, and that the party had no claim to discharged on *habeas corpus.*[3] In a further case in a State ırt,[4] the court, in holding an enlistment to be valid though it not comply with certain instructions to recruiting officers ıed by the War Department, adds—"We cannot in cases of s kind look beyond *the laws of Congress.*"[5]

This class of rulings might indeed be sustained upon another l a superior ground, *viz.* that the regulation of enlistments is a tter for the most part quite beyond the province of army reg- ıtions. As already indicated, it belongs exclusively to Con- ess to determine what descriptions of persons shall be employed our armies and upon what conditions, and for the executive partment to prescribe rules on the subject would appear to be ranscending of legitimate authority and assumption of legis- ive power.[6]

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1. See *ante*, Chapter III—"Army Regulations."

2. *In re* Stevens, 24 Law. Rep. 205.

3. *Ex parte* Schmeid, 1 Dillon, 587. And see Ferren's Case, 3 Bene- t, 442, where it is observed by Blatchford, J., in regard to the require- nt in question, that it is "a mere regulation made by the War De- rtment, directory to its subordinates, and *not a statutory enactment.*"

4. In the matter of Disinger, 12 Ohio St. 262–3.

5. See also O'Brien, 86.

6. See McCall's Case, 5 Philad. 259; Lanahan *v.* Birge, 30 Conn. 438, l other cases heretofore referred to on the subject of the exclusive wer of Congress, under the Constitution, over the subject of enlist- nts; also citations last made from Ferren's and Disinger's cases. d compare instances, previously noted, of legislation by regulation,

3. The terms of the contract or engagement of military service[1] are also clearly within the constitutional authority of Congress. Thus it is that department of the government alone[2] that can fix, on the one hand, the *period* of enlistment, and, on the other, the *consideration* which the soldier shall receive for his service, that is to say the pecuniary compensation that is to be paid him and the rations, clothing, &c., that are to be furnished him. All these matters have, from time to time, been regulated by the legislation of Congress.[3]

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in prescribing the color and height of recruits. See also *ante*, Chapter III, "Army Regulations—They must not legislate."

1. The engagement is of course to perform military service as a soldier: an enlistment entered into with the understanding that the party was to serve in other than a military capacity—as a laborer or clerk, for example—would be unauthorized and illegal. See DIGEST, 252. And compare DIGEST, 115 § 8, as to the illegality of employing a commissioned officer of the army on purely civil duty in the absence of express authority of Congress.

2. Thus it was held by Atty. Gen. Clifford, (IV Opins. 537–8,) that, where Congress has fixed the term of enlistment at 5 years, the President is not empowered to authorize an enlistment for a shorter term. "The executive department," he adds, "has discretionary authority to *discharge*," (expressly conferred by Congress in the 4th Article of war,) before the term of service has expired, but has no power to vary the contract of enlistment." And see DIGEST, 251 § 9; XV Opins., 362. An enlistment for 3 years under the existing law has been expressly held to be invalid. See DIGEST, 251 § 7; G. O. 82, Dept. of Dakota, 1869. That Congress alone can modify the *consideration* of the contract, see *post*.

3. *Term*. Enlistments have been authorized by statute for various terms, from 100 days, (Act of May 6, 1864,) to five years, the term commonly prescribed for time of peace. Also—in time of war—for "during the war;" or for a certain period, as three or five years, "or during the war." (See J. R. of Jan. 23, 1779, Oct. 21, 1780, and June 21, 1862; and Acts of Jan. 12 and Feb. 11, 1847.) As to the extent of this term, (so many years, &c., 'or during the war,') see Breitenbach *v.* Bush, 44 Pa. St. 317; Clark *v.* Martin, 3 Grant, 393; IV Opins. At. Gen., 539; G. O. 101, Dept. of Va., 1865; DIGEST, 252.

Compensation. The pay of enlisted men as fixed by Congress, has varied from $6⅔ per month, 'the soldier to find his own arms and clothes,' (Resolution of June 14, 1775,) to $16 per month, with $18 for first class privates of the engineer and ordnance corps. (Act of June 20, 1864.) The present pay is fixed by Secs. 1280–1284, Rev. Sts.

Subsistence. The soldier's ration, as added to and modified by a series of statutes, is now established by Sec. 1146, Rev. Sts., by which also the President is expressly authorized to "make such alterations in the component parts of the ration as a due regard to the health and

ılistment as a contract. We have thus seen what enlist- really is—a contract,[1] but a contract made with the State, · the specific authority of the Constitution, and thus gov- by those principles or considerations of expediency and ımy, expressed in the term "public policy." We have al- found that this peculiar contract, to which the Government arty, is not necessarily affected by the rules of the common specially applicable to the private engagements of minors. ı further feature that while the necessities of military disci- require that the soldier should be strictly obliged by the act, the State, on the other hand, is not bound by the con- .s though imposed by itself. Thus it may put an end to the of enlistment at any time before it has regularly expired ischarge the soldier against his consent.[2] So, pending the ement, it may reduce the pay, or curtail any allowance, ı formed a part of the original consideration.[3] The con- of enlistment is thus a transaction in which private right is dinated to the public interest. In law, it is entered into he understanding that it may be modified in any of its terms, olly rescinded, at the discretion of the State. But this dis-

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t of the Army and economy may require." Alterations have ime to time been made accordingly.

hing. Congress, by the Act of April 24, 1816, (Sec. 1296, Rev. has devolved upon the President the authority and duty of pre- g the "quantity and kind of clothing which shall be issued an- to the troops."

ırters and Fuel. These are matters provided for by Congress in nual appropriations for the Quartermaster Department.

[1] Enlistments into the army, made under the inducements held the laws of the United States, are contracts, and * * * ought onstrued according to those well-established principles which reg- ontracts generally." VI Opins. At. Gen., 190. And see John- Dodd, 56 N. Y. 81; Reed *v.* Reed, 53 Maine, 530; In the matter nball, 9 L. R. 502; In the matter of Ross, 1 N. Y. L. Obs. 341. n. *v.* Cushing, 11 Mass. 70, the obligation of an enlistment in the s contrasted with militia duty as follows:—"Enlistment is a con- service in the militia is merely obedience to a requisition of the which all are subject without discrimination."

[2] ee Clode, 2 M. F., 40; U. S. *v.* Cottingham, 1 Rob. 630; U. S. ceney, 3 Grat. 409. And compare the language of the Act of 3, 1795, in which a general authority to discharge at discretion is essly reserved to the Government."

[3] ee DIGEST, 252, and note, referring to the terms of the agreement ay now inserted in the formal enlistment paper. And compare ; *v.* Dinsman, 7 Howard, 1.

of pay shall be equivalent to, *i. e.* evidence of, a
far as to estop the offender from denying that he
army. So, in any other case, the fact that the pa
pay or a pecuniary allowance as a soldier, has b
such with arms, clothing, rations, &c., by the m
ties, or has voluntarily performed military servic
ders of a superior for any considerable period,—w
constitute *prima facie* evidence that he has ente
tract of enlistment with the United States.[1]

In our military system, however, all enlistment
larly accompanied by the taking and subscribing
allegiance, service and obedience, in writing, as e
2; and this Oath, as it appears in connection with
of the proper officials, &c., on the "enlistment pa
constitutes the almost invariable formula of a co
ment in our army.[3] As already indicated, howev
essential form; no oath need be taken, nor need

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1. 3 Greenl. Ev. § 483; Lebanon *v.* Heath, 47 N. H
Anderson, 16 Iowa, 599; Simmons § 872; G. O. 36, De
Do. 38, Dept. of the Platte, 1871; Do. 7, Dept. of Cal
248–9.

2. See present form of "enlistment paper" in Ar
page 411. At the outset of the formation of the first
viz. on June 14, 1775, and before any Articles of war h
Congress adopted a simple "Form of Inlistment," wl
quired to be sworn to, and was expressed as follows
have this day voluntarily enlisted myself as a soldier

ɔcribed, to complete the enlistment; and the described paper, le the regular and official record of the proceedings set forth, ɔt itself a contract but merely *evidence* of one.

IV. FOURTH ARTICLE.

[DISCHARGE OF SOLDIERS.]

ART. 4. *No enlisted man, duly sworn, shall be discharged from ɜervice without a discharge in writing, signed by a field officer ɜe regiment to which he belongs, or by the commanding officer n no field officer is present; and no discharge shall be given to enlisted man before his term of service has expired, except by r of the President, the Secretary of War, the commanding of- - of a department, or by sentence of a general court-martial.*" his Article, which first appeared in our law in Art. 2 of Sec. ɔf the code of 1776,[1] consists of two separate provisions, and be considered accordingly under the heads of—I. Requirets as to discharge in general; II. Discharge before expiration ɜrm of service.

REQUIREMENTS AS TO DISCHARGE IN GENERAL.

ffect and Application of the Provision. The first clause ıe Article is a general provision to the effect that all soldiers, n discharged from the military service, shall receive an inment of discharge in writing, signed by a commanding or ɜr specified officer, as the legal evidence that they have been harged in fact.[2] This requirement applies equally to all disɜges of the three kinds known to the law, *viz.* (1) the ordi- ɜ discharge given at the expiration of the term of enlistment; he summary discharge before expiration of term, authorized he second clause of the Article—these two sorts being "honɔle" discharges; and (3) the dishonorable discharge adjudged and given in pursuance of, a sentence of general court-martial.

The concluding provision of the corresponding Article of the code ɔo6 has been transferred, in the present code, to Art. 99.

That the formal discharge is *evidence* not only of the fact of disge but of the circumstances—when the same are stated—under which lischarge was given, see Board of Comrs. *v.* Mertz, 27 Ind. 103; Han- *v.* S. Scituate, 115 Mass. 336; U. S. *v.* Wright, 5 Philad. 2 Dr. ɔ, 3.

delivery, however, is not necessarily personal. T
soldier, while held in military custody, is dischar
of a sentence imposing dishonorable discharge to b
a term of confinement, the delivery, (pursuant to a
the place of confinement,[3]) of the written discharge
in command, *for* the prisoner, to be retained by t
rendered to the prisoner at the end of his term of
being a delivery to the use and for the benefit of
may properly be regarded as a delivery to him in l

Self-Discharge. The discharge is the act of the
through its official representative. It results from
the Article,—as it would indeed result from the prin
ing military enlistments independently of statute,—
legally in service, cannot discharge himself.[5] So
rule applied that a soldier leaving his regiment wit
discharge, though he immediately re-enlist in anot
is punishable under the 50th Article of war as a d

Discharge as a Right. But a soldier, thoug
discharge himself, is entitled, at the expiration o
enlistment,—except possibly in the presence of
emergency justifying the government in tempora
his services for the public defence,—to be forthwi

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1. See form in Regulations of 1881, page 30. That
not the discharge but only the "*evidence*" of it—see

ording to the Article.[1] His contract has been performed and ıpleted, and a new and independent contract is necessary in er to hold him for a further term.

. DISCHARGE BEFORE EXPIRATION OF TERM OF SERVICE.

he two kinds Distinguished. Two kinds of this dis- ɾge are authorized and recognized by the Article,—discharge he order of certain executive or military officials designated, discharge by sentence of general court-martial. The two are rly distinguished by the fact that, while the latter is a *punish- t* imposed upon a trial and conviction of a military offence, former is a mere terminating or rescinding of a contract.[2] ile the latter is known as "dishonorable," the former is, in legal sense, "honorable." A discharge by order, under the .cle, can be no more "dishonorable" than a discharge by ence can be "honorable."

'he punishment of dishonorable discharge has already been sidered in Chapter XX.

Discharge by Order. In its provision on this subject the icle illustrates the general principle of public law, heretofore iced,[3] that a contract of enlistment is subject, pending its con- ıance, to be modified by the authority of Congress, irrespective he will of the individual, the public interest being in such a case amount to the private. Here the authority to discontinue the tract at any time, at discretion, is vested by Congress alike in President or Secretary of War, and department commanders; the latter, it may be remarked, cannot, in the exercise of such hority, legally be restrained by the former. In practice, how- r, it is commonly the Secretary of War by whom discharges e been ordered under this Article, and the principal grounds occasions for the same have been—the termination of a state ar or hostilities rendering certain troops no longer necessary; ficiency, sickness or disability on the part of the individual ier; and minority.

U. S. *v.* Travers, 2 Wheeler Cr. C. 509, (Brunner, 486,)—Charge ıe jury by Story, J.; Prendergast, 42; DIGEST, 2.

See DIGEST, 3, 231; II Opins. At. Gen., 353.

Ante, p. 773—"Third Article."

recruit should be "conclusive as to his age." I
of Feb. 24 and July 4, 1864, the Secretary of War
required to discharge all persons enlisted unde
listed without consent who were under 18 at the
plication for discharge; thus authorizing him, a
case making it imperative upon him, to receive e
gard to the fact of age, and doing away entirely, as
provision of 1862 relating to the conclusiveness of
age in the oath of the recruit. Later, the Act of M
corporated in Sec. 1117, Rev. Sts.,) has restored t
which existed before the war by which all enlist
without consent were prohibited, and has thus r
tions of 1862 and 1864 authorizing enlistments
at 18, and all incidental and dependent provisions
Statutes contain no provision whatever as to th
the *oath* of enlistment as evidence of age, and n
the granting of discharges by the Secretary of
that embraced in the Article of War under consi
sults that Article 4 is now the only enactment
and further that the Secretary, in exercising h
discharging unemancipated minors under the A
stricted by any provision of law in his inquiry a
of the party.[1]

Minors under arrest or sentence. It n
marked that if an enlisted minor, entitled as

ing, and in practice almost invariably does refuse, to grant pplication in his case. In such an instance the rights of the idual are deemed to be subordinated to the interest of the c in the due administration of justice and maintenance of ary discipline, and the soldier is therefore required to abide undergo the legitimate consequences of his own wrong be- his claim to discharge from his contract can be entertained.[1] his effect have also been the rulings of the civil courts, which : repeatedly refused to discharge minors under the circum- ces indicated.[2]

imitation of the power of summary discharge. Inas- h as the Article expressly restricts the exercise of this power ie three agencies designated, it must, upon a familiar princi- of construction, be regarded as excluding from such exercise fficials other than those specified. Attorney General Ber- in applying this principle to the Article, in a case in which ight of discharge was claimed for a commanding officer not ioned therein, and in remarking that the right cannot be ted as attaching to command *as such*, observes as follows:— e authority to rescind a contract between the United States the individual—which is the effect of the discharge—is a r which can exist only by virtue of an express grant; it is

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DIGEST, 251. See recent Circular 5 of 1883.

Com. *v.* Gamble, 11 S. & R. 93; McConologue's Case, 107 Mass. In matter of Beswick, 25 How. Pr. 149; *Ex parte* Anderson, 16 599. In the recent exceptional case of U. S. *v.* Hanchett, U. S. Ct. Ills., Oct., 1883, 18 Fed. Rep. 26, a minor, enlisted without his ts' consent, within three days after his enlistment left the recruiting zvous, and did not voluntarily return, but was arrested and con- by the military authorities as a deserter. The court held that his g the service so soon after he had enlisted should be regarded, a desertion, but as an authorized disaffirmance upon his part of gal contract, and he was therefore discharged on *habeas corpus.* ourt lays weight upon the fact that the party had not been required form any military duty at the time he absented himself. "If he eserted," it is said, "after being assigned to duty and in the face enemy, or under any circumstances which endangered his com- a different question might be presented." So, importance is as- to the fact that it did not appear that formal charges had been ed against the party, or that a court had been ordered for his as if the military jurisdiction did not fully attach upon his *arrest* serter. The ruling in this case is at variance with established les of military law, and a departure from the previous course of n, and is not regarded as sound.

and finally from the service under his contrac
discharge is "honorable," whatever may have l
or the circumstances under which it was give
subject be a deserter,[3] an offender in arrest or on
vict under sentence of imprisonment,[5] he leav
good standing *legally*, being entitled to all pay d
joyment of all the other rights of an honorably
dier.[6] Such discharge is also *final* in detachi
absolutely from the army under the enlistment
lates, and, so far, from all military jurisdiction[7] a
(thus far also,) remanding him to the status and c
ian.[9] While an order for such a discharge may
fore it is executed,[10] the discharge once duly del
cancelled or revoked, except where obtained
fraud.[11]

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1. II Opins. At. Gen., 353. And see DIGEST, 3.
2. See XIV Opins. At. Gen., 583.
3. DIGEST, 233; U. S. *v.* Kelly, 15 Wallace, 36.
4. See case of soldier tried for mutiny, cited in DIG
5. The discharge in such case operates as a remi
pired portion of the confinement. DIGEST, 234.
6. DIGEST, 233.
7. Except as expressly reserved by statute,—as b
of war.
8. DIGEST, 234; and see case of White *v.* McDonou
cited in note to same.

While a discharge of this class cannot be other than "honor-e" in law, its cause or occasion, though not creditable to the ty, may be stated as a fact in the body of the certificate, and true history thus be officially declared:[1] further, where the ty is discharged for inefficiency or the like, the "character," alled, at the foot of the discharge, may, being properly no part the discharge, be cut off or left blank.[2]

Authority of the courts to discharge on habeas corpus. ether or not the effect of the legislation of 1864, above noticed, —as has been held by some of the authorities—to vest in the retary of War exclusive authority for the discharge of enlisted ors, and thus to oust the jurisdiction of the federal courts over subject, it is clear that, *under the existing law*, the right to rcise such jurisdiction is unquestionable; and it has been re-tedly so held.[3] Parties, therefore, deeming themselves ille-y enlisted or held to service by reason of minority or other-, may apply for their discharge either to the Secretary of r as authorized to discharge by the 4th Article of war, or to Courts of the United States upon *habeas corpus*. That the e courts can exercise no such jurisdiction in this class of cases finally settled by the U. S. Supreme Court, in Tarble's Case,[4] 869. Were such a court now to assume to issue the writ, the e would properly not be obeyed by a military officer, and an mpt to enforce it would properly be resisted.[5] Where, on the r hand, the writ proceeds from a U. S. Court, it is the duty of officer to whom it is addressed to make full return thereto of facts and grounds upon which he holds the party, and to bring body into court, to abide by such order, either for the dis-rge or the remanding of the prisoner, as the court may make the case.[6]

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1. DIGEST, 3, note.
2. DIGEST, 231–2.
3. Seavey *v.* Seymour, 3 Clifford, 440; *Ex parte* Schmeid, 1 Dillon, *In re* McDonald, Lowell, 106; McConologue's Case, 107 Mass. 154; *v.* Hanchett, *ante*.
4. 13 Wallace, 397. This important and leading case is fully cited in EST, 280–281. It has been affirmed in the recent case of Robb *v.* olly, 111 U. S. 632.
5. DIGEST, 281–282.
6. DIGEST, 282.

ART. 6. *Any officer who takes money, or other of gratification, on mustering any regiment, troop, pany, or on signing muster-rolls, shall be dismisse ice, and shall thereby be disabled to hold any offic in the service of the United States.*

"ART. 14. *Any officer who knowingly makes a man or horse, or who signs, or directs, or allows th muster-roll, knowing the same to contain a false m proof thereof by two witnesses, before a court-mart from the service, and shall thereby be disabled to employment in the service of the United States.*"

The natural order of these Articles, and that have appeared in all previous codes, commenci 1775,[1] is—14, 5, 6. Art. 14, which has been m present code and should be numbered 5, (the t properly numbered 6 and 7,) will, as being the r and in fact including Art. 5, be first considered. dix, the *charges* for false muster, &c., will follow code.

FOURTEENTH ARTICLE.

Construction and Effect—"*False muste* this offence were made punishable in the old l (particularly in those of Charles I and of the Army,) and in Art. 121 of the Code of Gustavus the acts which may constitute a false muster

ons the following, which embrace all or nearly all forms of the ence as now understood:—'the substitution, on the muster-ll, of one man or horse for another;[1] the presenting of either second time, under a different description, at the same muster; e mustering of any person by a wrong name; the mustering a person as a soldier who is not a soldier,' (the kind of false aster specially made punishable by our Art. 5;) 'the including officers or men as present when they are in reality absent om their regiment, &c.; the including of them as members of e corps or company after they are deceased or have been dis-arged; the representing of persons as effective who, because some disability, are really ineffective in the sense of the law regulations.'[2]

"Knowingly"—"Knowing." The guilty knowledge, which the gist of the offences specified,[3] may be proved by direct idence, but, more generally, will be established inferentially m circumstances indicating that the accused must, in all rea-nable probability, have made the muster, or signed, &c., the l, with knowledge that it was in fact, wholly or in some ma-ial part or parts, untrue or deceptive. An officer will in gen-l properly be charged with the knowledge of what it is his office know, or what he is bound to know in the performance of the ticular duty devolved upon him.[4]

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he present century are those which most nearly resemble our own, ch in fact were in great part taken from them. Of these articles UEL, whose work—"An historical account of the British Army and he Law Military"—was published in 1816, is the clearest and best onent.

. In G. O. 103, Dept. of the Ohio, 1864, is a case of a conviction of lse muster in violation of this Article in mustering for pay a certain ate as first sergeant, when another soldier of the command was the son entitled to be noted and paid as such on the roll.

. Samuel, 301. And see Hough, 119; O'Brien, 88–9. The offence qually committed whether the false muster, (if in writing,) be made n one of the regular "Muster-and-Pay" rolls, upon which our sol-s are paid every two months, or upon one of the so-called "muster-or "muster-out" rolls, especially familiar to our practice during the war, by which State troops were formally admitted into or detached the military service of the United States.

See Samuel, 305.

"The proof must show either actual knowledge of the falsehood, at by ordinary care and attention to his duty the accused would known the falsehood." Samuel, 303.

Where it appears that the accused had knowledge of th statement or entry, his motive or object in making the r or signing, &c., the roll, is of no consequence in law.[1] W he aimed to defraud the United States, to secure some p advantage, or to injure some individual, or whether his merely one of gross carelessness, without fraudulent or int purpose, are questions quite immaterial to the issue of innocence:[2] they are immaterial also to the consideratio punishment, this being made mandatory by the Articl conviction.

"Two witnesses." This measure of proof is similar enjoined by the common-law rule in the case of perjury, a similar reason. Were there but one witness as to the all of guilty knowledge, it might with fairness be claimed t testimony was counterbalanced by the official act or staten the officer in the muster or roll: at least one other wit therefore properly required to turn the scale against the a

FIFTH ARTICLE.

Its Effect. As this provision merely makes punishable ticular description of the crime of false muster, it might v omitted from the code as embraced within the general desc of Art. 14. Judging from its terms in the earlier forms,[3] originally aimed mainly at the offence of causing retain officers' servants to take the place of soldiers and answer a upon the muster. As at present worded, it is immaterial sort of persons are thus substituted.[4] The direction—"sh

1. Samuel, 305; Hough, 119–120; O'Brien, 89.

2. "The mischief intended to be prevented by the law is a false ment of the numbers or circumstances of the forces, which is, or n alike detrimental to the public purse and the service; and this m would be the same whether it were occasioned by negligence or i tion, or open or concealed fraud." Hough, 119. And see Samu

3. The original form of 1775 and 1776 was:—"Any officer wh presume to muster any person as a soldier who is at other times tomed to wear a livery, or who does not actually do his duty as a s shall be deemed guilty of having made a false muster, and shal accordingly."

4. See case in G. O. 23, Mid. Mil. Dept., 1865, of an officer co of falsely mustering, on a muster-out roll, "four persons who w soldiers."

;hed accordingly," means of course shall suffer the punish- prescribed by the principal (misplaced[1]) Article—the 14th.

SIXTH ARTICLE.

nstruction and Effect. This Article makes it an offence ı officer to accept or receive, directly or indirectly, a pecu- or other compensation in connection with, and in relation e making of an official muster or the execution of a muster- Samuel,[3] in remarking, with regard to the corresponding ,h article, that "the taking of the gratuity is the act pro- :d and is of itself the sole offence," adds that, if the same *-eceived*, no matter with what view on the part of the person ;ing it, or what effect it may afterwards have on the muster ı the signing of the rolls, the offence will be complete." :en's comment is—"The Article is explicit and makes no .ction whether the muster-rolls were true or false."[4]

e Punishment Prescribed in the Foregoing Articles. ɜ Articles are peculiar in being the only ones in the code h prescribe, with dismissal, the penalty of disability or *dis- fication for office or employment under the United States.* The ity of the punishment is traced by Samuel to the period of eign of Henry V, when the British armies were raised and ›ped "on the private contract of individuals," whom it was .dered necessary to compel, at the peril of the severest pen- ;—in some instances even of death—the mustering or ex- ing upon rolls, of genuine troops, and the furnishing of the ıl complements required.[5] Subsequently, when, as the same

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See *ante*, p. 782.
Compare Hough, 131–2.
Pages 312–313.
Page 89. In S. O. 419 of 1864, an officer in command of a recruit- endezvous is summarily dismissed for accepting money from a State iting agent, "in consideration of certain certified copies of muster-in to be furnished said agent; such acceptance of money being in vio- of the 16th" (now 6th) "Article of war."
Samuel, 294. So, Atty. Gen. Legaré, (III Opins., 694–5,) observes: : extreme jealousy of the law upon the subject of actual presence ıp and corps of every man liable to duty as a soldier is clearly ı by the severity with which it punishes officers guilty of imposing their superiors in the slightest degree in the matter of muster cer- ;s. * * * The strictness with which any attempt to foist nks or in the place of a soldier one who is not in fact, h," (is punished?) "is remarkable."

punishment for this class of offences alone no suffi
discovered now to exist. It would be an improvem
to limit the penalty directed by these Articles to d
or leave it discretionary with the court.

As has been remarked in Chapter XX, the dis
office, &c., here prescribed, attaches as a legal c
the conviction and punishment of dismissal fro
and need not be specifically adjudged in the sente

VI. THE SEVENTH AND EIGHTH A

[OFFICIAL RETURNS.]

"ART. 7. *Every officer commanding a regiment,*
troop, battery, or company, or a garrison, shall, in
of every month, transmit through the proper chann
partment of War, an exact return of the same,
names of the officers then absent from their posts, w
for and the time of their absence. And any office
neglect or design, omits to send such returns, shal
thereof, be punished as a court-martial may direct.

"ART. 8. *Every officer who knowingly makes a*
the Department of War, or to any of his superior
ized to call for such returns, of the state of the reg
company, or garrison under his command; or of th
nition, clothing or other stores thereunto belonging

the Secretary of War, advised as to the available strength of the army, by means of frequent and accurate reports of the numbers and condition of its minor component parts. The Army Regulations, Art. LIII, specify particularly as to the time and mode of forwarding these monthly returns, their form, &c.

The Offence made Punishable. This consists in the omission, either deliberately or through remissness, to send a return, or an "exact" return, in the manner directed. If such an omission be caused by personal disability, by the neglect of another person for whom the commanding officer cannot be held responsible, by an exigency of war, or by other cause beyond the officer's control, he cannot properly be held amenable under the Article. In general, however, the mere fact that no return has been sent for a certain month or months will be ground for presuming at least neglect on the part of the officer, and devolve upon him the burden of rebutting such presumption. To sustain a charge under the Article, it must of course appear that the accused, at the time of the alleged omission, was exercising one of the commands specifically designated. The omission contemplated—it may be noted—will subject the commander, not only to military trial, but also to criminal prosecution, and fine if convicted, under Sec. 1780, Rev. Sts.

EIGHTH ARTICLE.

Its Object. "The object," observes Hough,[1] "of making the returns here indicated as to the state of the *command*, is to enable superior officers authorized to call for such returns to become acquainted with the strength and efficiency of regiments, &c., and therefore a false return may be attended with very serious consequences." Of the returns of *arms, &c.*, he adds:—"The object of such returns is to check the issues and receipts of arms, &c., furnished to regiments from the magazines, &c., as well as to ascertain the state and condition of the equipments in use."

The Offence. To render an officer making a false return amenable to justice under this Article, he must be a *commanding officer*, and must exercise the command of a regiment, com-

1. Pages 132, 133.

pany, or garrison.[1] The false return to his superior, of a staff officer, or acting staff officer, not exercising a command, would properly be charged, not as a violation of this Article, but of the 62d, or perhaps 61st. Thus the conviction, under this Article, of an Acting Commissary of Subsistence, of making false returns to the Commissary General in the form of false abstracts of purchases, was disapproved by the Secretary of War in a General Order;[2] and in a further Order[3] the same action was taken upon a similar finding in a case of an Assistant Quartermaster, charged with a breach of this Article in rendering false accounts current to the Chief Quartermaster of the military department.

The "superior," other than the Secretary of War, "authorized to call for" the return, will generally be the department, or regimental, commander, according to circumstances; or, in the case of ordnance stores, or clothing and "camp and garrison equipage,"[4] the Chief of Ordnance or Quartermaster General.

To constitute therefore the offence, it must be shown that the accused held at the date of the return one of the commands designated; that the return was of one of the classes contemplated, and was made by the commander either to the Secretary of War or to a superior authorized by statute, regulation, or usage to require it;[5] that it was false and that the accused knew it to be so. The return itself or a certified copy should be put in evidence. As to the character and extent of the falsity essential to be established, it is held by Samuel[6] that the return need not be false throughout,—that it is sufficient if it be false in any one material particular. As to the matter of knowledge, the same author observes[7] that—"an officer will always be presumed to know what from the duty of his office he is bound to know, or ought to inform himself of. So that ignorance of the contents of the returns

1. See DIGEST, 4.
2. G. C. M. O. 12 of 1872.
3. G. C. M. O. 19 of 1872.
4. Stores "thereunto belonging" means of course belonging to, or issued to and held by, the regiment, company, or garrison. That the returns contemplated in the Article are returns of the *personnel* or *matériel* of the command, and do not include returns of *funds*,—see DIGEST, 4.
5. See Simmons § 161; O'Brien, 303.
6. Page 320. And see Hough, 134; DIGEST, 4.
7. Pages 320–1. And see Fourteenth Article—"Knowingly," &c.

ribed by an officer cannot be pleaded in excuse, for it was ısiness previously to inquire—as it will be in all cases where gnature is not merely formal—into the truth of the state- ; made in them; otherwise the returns might as well have signed in blank."

e **Punishment.** That the term "*cashiered*" employed in ırticle has no peculiar significance but is equivalent to *dis- d*, has been noticed in Chapter XX.

THE NINTH, TENTH, FIFTEENTH, SIXTEENTH AND SEVENTEENTH ARTICLES.

[RESPONSIBILITY FOR PUBLIC PROPERTY.]

RT. 9. *All public stores taken from the enemy shall be secured :e service of the United States; and for neglect thereof the anding officer shall be answerable.*

RT. 10. *Every officer commanding a troop, battery, or com- is charged with the arms, accouterments, ammunition, cloth- r other military stores belonging to his command, and is ıtable to his colonel in case of their being lost, spoiled, or dam- otherwise than by unavoidable accident, or on actual service.*

RT. 15. *Any officer who, wilfully or through neglect, suffers 'ost, spoiled, or damaged, any military stores belonging to the d States, shall make good the loss or damage, and be dismissed the service.*

RT. 16. *Any enlisted man who sells, or wilfully or through t wastes the ammunition delivered out to him, shall be pun- as a court-martial may direct.*

RT. 17. *Any soldier who sells or, through neglect, loses or his horse, arms, clothing, or accouterments, shall suffer such ıges, not exceeding one half of his current pay, as a court- al may deem sufficient for repairing the loss or damage, and be punished by confinement or such other corporal punishment court may direct.*"

NINTH ARTICLE.

ɔ **Principle of the Article.** This Article, of which the al in our law[1] is Art. 29 of 1775, is, in its first clause, but an

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:ompare with it the 25th Article of the Code of James II, in dix.

application of the principle of the law of modern war and of nations, that enemy's property captured in war becomes the property of the government or power by whose forces it is taken, and not that of the individuals who take it.[1] Congress, which, by the Constitution, is exclusively vested with power to dispose of the property of the United States, as well as to make rules concerning captures on land and water, has applied the above principle strictly to the Army by this Article. It has not only provided for the army no allowance from the proceeds of captured stores corresponding to the prize money made payable to the navy, but, by Art. 9, has made the neglect to secure such stores to the use of the United States a military offence.[2]

Construction—*"The commanding officer."* In the Articles of 1775 the responsibility for a non-observance of the like provision was imposed upon "the commander-in-chief." The term "commanding officer," now employed, is regarded as meaning the officer in command of the separate and distinct organization in which the capture is made—as a "separate brigade," di-

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1. Decatur *v.* U. S., Devereux, 110; U. S. *v.* Klein, 13 Wallace, 136; White *v.* Red Chief, 1 Woods, 40; Branner *v.* Felkner, 1 Heisk. 232; Huff *v.* Odom, 49 Ga. 395. "Private persons cannot capture for their own benefit." Worthy *v.* Kinamon, 44 Ga. 299. And see XIII Opins. At. Gen., 105; G. O. 54, Hdqrs. of Army, Mexico, 1848; Do. 21, War Dept., 1848; Do. 64, 107, Id., 1862; Do. 160, Id., 1865. The same principle was recognized by Congress in the "Captured and Abandoned Property Act," of March 12, 1863. See Lamar *v.* Browne, 92 U. S. 195. And see further on this subject under PART II.

2. The cases in which Congress has authorized captured property or its proceeds to be appropriated to the use of the troops have been most rare. Art. 12 of November, 1775, appears to recognize a right, on the part of officers and soldiers in good standing, to "share" in "plunder taken from the enemy." At the capture of Stoney Point, in July, 1779, it was Resolved, (3 Jour. Cong., 329,) "that Congress approve the promises of reward made by Brig. Gen. Wayne, with the concurrence of the commander-in-chief, to the troops under his command;" and "that the value of the military stores taken be ascertained and divided among the gallant troops by whom it (Stoney Point) was reduced, in such manner and proportion as the commander-in-chief shall prescribe."

In a peculiar Order issued during the late war—G. O. 216, Dept. of the Mo., 1864—in consideration of the services of certain militia, in dispersing a band of "bushwhackers," it is directed that, "the horse ridden by the leader, and the watches and arms taken will be given to the several officers of the command to be retained as honorable trophies," and that the money captured be distributed to the wounded and the families of those killed.

ision, or army, or a regiment or detachment when operating parately.[1]

"Answerable." By this term is understood—responsible and able to be called to account, and, in a proper case, subject to ilitary trial and punishment.[2]

TENTH ARTICLE.

Construction and Effect. This provision appeared first in ir law, and in substantially the same form, in Art. 5 of Sec. XII the code of 1776. The obligation which it devolves upon mpany commanders is one of the fundamental principles of our ilitary system, where the company is the unit of organization. he details of the proper performance of this duty are indicated the Army Regulations.[3]

The Article is directory only. It has, however, as its penal mplement, Art. 15, under which an officer who fails wilfully through neglect to properly care for the public stores in his iarge may be tried and punished. And any improper disposi-on of such stores otherwise than as specified in that Article ould be chargeable as an offence under Art. 60 or 62. More-rer, for a failure duly to *account* as contemplated in the present rticle, the officer would be subject to a stoppage of his pay till ie pecuniary value of the stores not accounted for was made ood.[4]

The declaration that the officer is "accountable to his colonel" deemed to intend that it is devolved upon colonels of regiments

1. G. O. 64 of 1862 requires that captured property of the sort indi-ited in the Article "be turned over to the chiefs of the staff departments, which said property would appertain, on duty with the troops," to "accounted for by them as captured property and used for the pub-: service," unless otherwise ordered in special cases.

2. See G. O. 27 of 1863, in which two officers are summarily dismissed r appropriating property taken from the enemy. By Sec. 5313, Rev. s., officers and soldiers are required to turn over all captured property the proper authority, and are made punishable by fine and imprison-ent for selling or "in any way dealing in" such property.

3. See par. 1738 *et seq.* Prior to the enactment of July 15, 1870, a ecial allowance, (similar to that made in the British service—see Sam-l. 538,) of $10 per month was made to company commanders "for sponsibility of arms and clothing."

4. See, in this connection, the provision of the Act of May 18, 1826, incorporated in Sec. 1304, Rev. Sts.

to enforce the obligation enjoined in the Article, by causing the proper stoppages to be made, (or reporting the facts to the War Department for such or other action,) or by preferring charges in cases of dereliction on the part of their company commanders of such gravity as to call for trial and punishment.

Samuel,[1] in construing the concluding clause of the Article, observes that—"by '*unavoidable*' is intended what could not have been prevented by common and ordinary prudence, and not what might have been avoided by possible or extraordinary exertions."

FIFTEENTH ARTICLE.

The Original Enactment. The original Article—No. 1 of Sec. XII of 1776, and No. 36 of 1806—of which the present provision was a part, denounced also the offences of unauthorized selling, embezzlement and misapplication of military stores. But, as to this portion, the Article was practically superseded by the subsequent Act, "to prevent and punish frauds upon the Government of the United States," of March 2, 1863, c. 67, which is now, by the Revision of 1874, incorporated with the code as Article 60.

Construction—*"Through neglect."* In view of the fact that so severe a penalty as dismissal is made mandatory in all cases by this Article, it would seem that the 'neglect' here contemplated was a special neglect, and of a positive and gross character, and not merely such a neglect, to the prejudice of order or discipline, as is indicated in the general—62d—Article. Such is indeed the conclusion, in substance, of Samuel, in construing the corresponding British Article.[2] Thus while any neglect, resulting in a loss, &c., of stores, would, strictly, be cognizable under Art. 15, it would ordinarily be preferable not to resort to it for the punishment of slight or negative neglects of duty, but to charge thereunder only such neglects as in their gravity were assimilated to the *wilful* act also constituted an offence thereby.[3]

"Suffers to be lost," &c. The wilful or neglectful sufferance specified by the Article may consist in a deliberate violation of

1. Page 538.
2. Pages 516–517.
3. See Samuel, 517.

sitive disregard of some specific injunction of law, regulations, orders; or it may be evidenced by such circumstances as a ckless or unwarranted personal use of the property; causing or owing it to remain exposed to the weather, insecurely housed not guarded; permitting it to be consumed, wasted or injured other persons; loaning it to an irresponsible person by whom is damaged,[1] &c.

"*Shall make good the loss or damage.*" This provision regarded as imposing a general pecuniary liability which may enforced independently of the sentence.[2] Thus, while it would t be irregular for the court, in connection with dismissal, to pose a forfeiture of an amount of pay sufficient to reimburse United States for the loss involved, and *specified* to be forted for that purpose, it would be legal and regular, in the ence of any such forfeiture in the sentence, to *stop* the proper n against the pay of the officer till fully satisfied. Strictly, most correct form of a judgment, under this Article, would, is believed, be—to add, in the sentence, to the imposition of dismissal, (with other penalty if awarded,) as the *punishment*, tatement that the court estimates the value of the stores lost, , to be a certain amount specified.[3] The stoppage then orred would properly concur with this estimate.

SIXTEENTH ARTICLE.

Construction and Effect. The original[4] of this Article, in codes of 1776 and 1806, made offenders triable only by a regental court. The present form is a more effectual provision the punishment of the soldier, whether for selling his ammuion, or for any neglect, grave or slight, resulting in its waste; general court being resorted to where the offence, or loss en-

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1. See Hough, 259; also recent case of violation of this Article in G. M. O. 85 of 1882.

2. See Samuel, 516; O'Brien, 131.

3. As in the sentence adjudged upon a conviction under this Article, lished in G. O. 341 of 1863. See remarks in regard to a similar vision of Art. 17, *post*.

4. The true original is Art. 42 of the code of James II, where the nces denounced are made punishable with death. And compare 80 of Gustavus Adolphus.

Origin. The original of this Article in our
Sec. XII of 1776, from which the present form di
terial particulars,) only in the omission of the w
before the word "stoppages"—a correction callec
that soldiers are now paid, not by the week, but
in our army. Our first Article, which was take
a provision of the British Articles in force prior
tionary War,[2] may be said to be derived from
Arms, as settled in the reign of Henry II, A. D. 1
it was declared that no one, required or entitled
with arms or armor, "could either sell, pawn, le
them out of his custody."[3] Subsequent provisi
effect are to be found in the Code of Gustavus A
the Articles of Charles I and James II.

**Construction—*"Sells, or through neg
spoils."*** These words of description define a
classes of offences cognizable under this Article.
ized disposition, other than selling or neglectful
ing, is not chargeable here, but must be laid un
provision of the code, as Art. 60 or 62. Thus it
that *pawning*, which is not strictly selling, shou
charged under the Sixty-second Article;[4] and so
of the *gambling away* of his clothing by a soldie
The *neglect* specified may be of any degree—fr

1. With this Article note the prohibition repeated i
3748, Rev. Sts.
2. See Appendix.
3. Tytler, 373–4.
4. G. C. M. O. 17, Dept. of the Mo., 1874.
5. G. C. M. O. 41, Dept. of Texas, 1873.

ıeglect to the negligence involved in an omission to take :are of the thing or a mere carelessness in the use of it.[1]
e *spoiling* indicated is deemed to consist in the doing to the ; such injury or damage as to render it wholly or in any ma- . part unserviceable, or unfit for the use for which it was ned.

Iis horse, arms, clothing," &c. It is clear, and is agreed .e authorities,[2] that the term "his" is not intended to con- he idea of property or ownership, but means—issued to him soldier and in his possession.[3] That this is its effect is ially evident from the fact that the term applies as fully ɛ horse and arms of the soldier in which he has no prop- ıs to the clothing of which he has a qualified ownership. hese things indeed, whatever their tenure, when issued to ɔldier, are issued with a view to use in the service, and with nderstanding that they shall not otherwise be disposed of, hall be reasonably cared for and safely kept. The Article, ıking penal such a disposition, (by selling,) and an absence ıch care, holds the party to the same accountability with 'd to clothing as with regard to the other objects mentioned.

lccouterments." This term refers to the minor articles of ldier's personal equipment or horse-furniture, such as the

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In a case in G. C. M. O. 120, Dept. of Cal., 1882, Gen. Schofield ves as follows:—"In cases of this class it should be clearly under- l that where clothing duly issued to a soldier disappears without rent cause, the soldier, entrusted as he is with the safe keeping and :r care of the property, is in general to be presumed to be charge- vith neglect in the care or keeping of the same, and will in general :rly be held liable for such neglect by a Court-Martial under the Article of War, unless by reasonably satisfactory evidence he shall account for the loss and acquit himself of fault. If the soldier at me of the loss is absent without leave, or under the influence of ', or otherwise improperly conducting himself, the presumption ;t him of neglect will of course be stronger than where he is not thus ɔle."

ɜ. O. 35, Dept. of the East, 1869; Do. 31, Dept. of the South, G. C. M. O. 1, Id., 1882; Do. 15, Dept. of Texas, 1880; Do. 84, f Pacific and Dept. of Cal., 1881; Do. 5, Dept. of the Columbia, DIGEST, 6. And compare U. S. *v.* Brown, 1 Mason, 151. In G. Dept. of the South, 1873, it was held *not* a violation of this Arti- t the accused had sold a coat, not issued to himself, but purchased ı from a discharged soldier.

.s to a similar use of the same word in Art. 42, see that Article,

belts, cartridge box, saddle, bridle, &c. Where it is whether an implement or instrument, required to be used by the soldier, and which is not an *arm*, is an acco a spoiling, &c., of the same should properly be charge der this, but under the 62d Article. Thus the breakin dering unserviceable of his bugle, by a bugler, was p charged in a late case.[1]

"Shall suffer such stoppages, not exceeding or his current pay, as a court-martial may deem for repairing the loss or damage." This prov apparently distinguished in the Article from that rela *punishment* that it is believed to be most accurately co holding that the stoppage was not intended to form a the sentence, but to be fixed, as to amount, by the co nection with its finding or sentence, and enforced, stoppages, as a charge against the soldier's account, pendently of the sentence.[2] The language employed, not altogether clear, and *in practice*, in probably the r cases, the stoppage has been included in the sentenc such or as a forfeiture of pay.[3] This may indeed be r a sufficiently legal form for the purpose; but, where s employed, the sentence should, properly, specify that t stopped or forfeited is that estimated by the court as su repairing the loss or damage, or in terms to this effect

The term—"not exceeding one half of his curren construed to mean that, however large be the amoun sential by the court for reimbursing the United Sta loss or damage, the soldier shall not be subjected to a s any greater sum than one half his pay *for any one m* half his pay for a single month will not satisfy the jud remainder must be stopped against the pay for the month or months; no more, however, than half of t

1. G. C. M. O. 36 of 1876.

2. This view is taken in DIGEST, 5–6. And see G. O. 1 G. C. M. O. 2, Dept. of Dakota, 1881; Do. 1, Dept. of the S And, regarding the stoppage as no part of the punishment, i the amount of the same would not affect the jurisdiction of a or garrison court under the Article. G. O. 110 of 1876; D

3. This practice has been sanctioned by the Secretary of cular Letter, A. G. O., April 6, 1883.

4. See G. O. 31, Fourth Mil. Dist., 1869.

thly pay for any particular month being affected by the stop-
e.[1]

he "loss or damage" will be measured by the value of the
g sold, lost, &c., or the sum that would be requisite to replace
Where the value has been fixed by a General Order or regu-
on, the amount thus established should be declared by the
rt as the proper amount of the stoppage.[3]

"*Confinement or such other corporal punishment.*" view of the abolition of flogging, and of the fact that very few er adequate or desirable punishments of a "corporal" char-er remain to be availed of,[4] confinement will be the penalty ost invariably resorted to; the duration and severity of the e being proportioned to the gravity of the offence. In a case the selling of property of the United States issued to the soldier, a horse or musket,—an act which would constitute embezzle-nt in law,—confinement in a *penitentiary* will be a legal pun-ment if imposable in a like case under the existing local law. e limitation as to the form of sentence in the Article precludes course the imposition of forfeiture, fine, or dishonorable dis-rge, by way of punishment.

VIII. THE ELEVENTH, TWELFTH AND THIRTEENTH ARTICLES.

FURLOUGHS—CERTIFICATES OF ABSENCE—FALSE CERTIFICATES.]

ART. 11. *Every officer commanding a regiment or an inde-dent troop, battery, or company, not in the field, may, when act-*

In G. O. 35, Dept. of the East, 1869, the stoppage is in the form forfeiture of "one half of his monthly pay for the period of four ths." In G. C. M. O. 75, Dept. of the Platte, 1876, the form is—be stopped in sums not to exceed one half his pay per month until ame is made good."

G. C. M. O. 15, 53, Dept. of Texas, 1880. The remarks of Gen. in these cases are especially to the point. The loss to the United s is *not* measured by the mere expense of transportation. G. C. . 5, Dept. of the Columbia, 1883.

See G. C. M. O. 53, Dept. of the Mo., 1869, as to the stopping of alue of a Spencer carbine, as fixed by existing Orders.

See par. 896, Army Regs.; also Chapter XX—"SENTENCE AND SHMENT."

any troop, battery, or company not in the field,
any garrison, fort, post, or barrack, may, in the
officer, grant furloughs to the enlisted men, for a
twenty days in six months, and not to more tha
absent at the same time.

"ART. 12. *At every muster of a regiment, tro*
pany, the commanding officer thereof shall giv
officer certificates, signed by himself, stating how
have been absent and the reasons of their absen
manding officer of every troop, battery, or comp
certificates, stating how long absent non-commi
private soldiers have been absent and the reaso
Such reasons and time of absence shall be inse
rolls opposite the names of the respective absent o
and the certificates, together with the muster-ro
mitted by the mustering officer to the Departmen
as the distance of the place and muster will adm

"ART. 13. *Every officer who sings a false*
to the absence or pay of an officer or soldier, shal
the service."

ELEVENTH ARTICLE.

Its Effect. This Article, which is a consoli
nal provision derived from Art. 56 of 1775, wi
of March 3, 1863, does not call for special con
plies to formal written leaves of absence for s

ting furloughs properly includes the authority to grant *exten-* : of the same, which indeed are practically new furloughs.

ɔrm and Operation of Furlough. The form of the written ıugh is given in the Army Regulations.[1] At the end of the it is declared that the soldier shall rejoin his regiment, &c., e completion of the authorized period, "or be considered a rter." This is to be regarded, however, as meaning, not that ɾill thus *necessarily* become or be treated as a deserter, but he will be *presumed* to be such in the absence of a satisfac- explanation of his failure or delay to return at the proper the *onus* of promptly making such explanation devolving : himself. The status of a soldier on furlough is in most :cts the opposite of that of a soldier on duty. While subject : recalled before his leave has expired if, in view of an ex- :y, his services are required, and liable to be treated as a de- r if he takes advantage of the occasion to abandon the army, ı otherwise, in his legal relations, practically a civilian; the :ary command and jurisdiction being suspended in his case.[2]

TWELFTH ARTICLE.

ɜ **Effect.** This provision, scarcely modified since 1775, is, :escribing as to the form of certifying the absences of officers soldiers on the muster-rolls, &c., directory merely, and not l. It is indeed rather introductory to the Article which fol- , by which the signing of false certificates (as to absence, &c.,) ıde a specific military offence.

THIRTEENTH ARTICLE.

fect and Construction. This Article which, originally, .rt. 58 of 1775,) referred only to certificates of *absence*, was :, in the code of 1806, to include certificates of *pay* also.[3] In ıresent practice, it applies to the certificate appended to the er-and-Pay Roll, which covers remarks in regard to absence, ınd other matters. It will be observed that it is distinguished Arts. 5 and 14, relating to false muster, in that it does not

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Par. 208. See the early form of furlough prescribed by Congress ıe, 1781. 3 Jour. 633.

See Chapter VIII—"Jurisdiction during absence on leave," &c.; *ost* under "Fifty-Ninth Article."

As apposite here, (and to Arts. 12 and 14,) see the remarks Gen. Legaré, in III Opins., 694–5.

require, to constitute the offence, that the officer shall *know* sign the false certificate, but only that the certificate shall b *in fact*. The Article evidently views it as a duty of a com ing officer to be informed, (especially upon occasions of m as to the presence or absence of, and the payment rendered to, the officers and men under his immediate command, an templates that, in signing the certificates, he will, if he ha his duty in this regard, necessarily have personal knowle the facts to which he subscribes. It will therefore be no cient defence to a charge under this Article, that the accu *lieved* the certificate signed by him to be true, if it was false. Upon this point it is observed by Samuel,[1] that th cle proceeds "upon the presumption that the party certif bound to inform himself fully of all that he is in duty calle to certify; and if he be negligent in informing himself, c anything on trust, he cannot find any lawful excuse in his rance or misplaced confidence, being both in opposition to and manifest duty."

The mere signing of an officer's pay-roll or voucher before t on which the pay becomes due has been held not to constitute lation of this Article;[2] the certificate signed not being a "f one in the sense in which the term is here employed: furthe Article is regarded as contemplating false entries or state made in regard to third persons, such as the soldiers and s dinates of the command of the officer signing, and not a bracing such statements in regard to himself. For the latte son, the offence of fraudulently duplicating his personal pay by an officer, is, in the opinion of the author, not properly lation of this Article or chargeable under it.[3]

IX. THE EIGHTEENTH ARTICLE.

[TAXING, OR BEING INTERESTED IN, THE SALE OF PR VISIONS, &C.]

"ART. 18.—*Any officer commanding in any garrison, fo barracks of the United States who, for his private advantage*

1. Page 298. And see O'Brien, 302; DIGEST, 5.

2. DIGEST, 5; G. C. M. O. 28 of 1872.

3. It is so charged, indeed, in a recent case in G. C. M. O. 20 of where, however, the court found not guilty of the charge but gu "conduct to the prejudice of good order and military discipline."

duty or imposition upon, or is interested in, the sale of any als, liquors, or other necessaries of life, brought into such gar-, fort, or barracks, for the use of the soldiers, shall be dismissed the service."

s Object and Effect. This provision, dating from Art. 66 75,[1] is the only portion remaining in force of the three Arti- of the code of 1806 relating to the business of *sutlers*—a which has been done away with since July 1, 1867.[2] Its *object* evidently is,—on the one hand to prevent officers profiting themselves, to the oppression of venders of pro- ns and to the injury of the soldiers for whom the same are ly intended; and, on the other hand, to prohibit combina- between officers and venders, by which undue facilities are shed to the latter, to the exclusion of other parties and to probable detriment and defrauding of the soldier. In its , the Article may be regarded as declaring that either rela- however slight be the interest or profit, is wholly incom- le with the character and province of an officer of the army, cially when commanding troops.

to the *interest* referred to—this, as is noticed by Samuel,[3] not be a direct interest such as that attaching to a partner- or part ownership of the articles introduced for sale, but be one of an indirect or contingent character, as for instance terest arising from an agreement or mutual understanding een the officer and the owner of the supplies that the former receive a percentage on the sales, or a commission on all ts above a certain sum, or some present of money or goods turn for his sanction of the speculation or promotion of the ness.

ses under the Article. Instances of trials for violations is Article have been of rare occurrence. In one General r it has been held that it was no defence to a charge, against ficer, of having exacted a sum of money from a citizen as a

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With this Article and the corresponding Art. 4 of Sec. VIII of see the Resolution of Congress of June 17, 1776, *in pari materia.* r. Cong. 377.

By the Act of July 28, 1866. As to the legislation relating to ers," (the successors of sutlers,) see DIGEST, 382–3—"Post trader." ages 445–6. And see O'Brien, 113.

"ART. 19. *Any officer who uses contemptuous o*
words against the President, the Vice-President, th
the United States, or the chief magistrate or legisla
the United States in which he is quartered, shall be
the service, or otherwise punished, as a court-marti
Any soldier who so offends shall be punished as a
may direct.

"ART. 20. *Any officer or soldier who behaves hi*
respect toward his commanding officer shall be puni
martial may direct.

"ART. 21. *Any officer or soldier who, on any pr*
ever, strikes his superior officer, or draws or lifts u
or offers any violence against him, being in the e
office, or disobeys any lawful command of his superi
suffer death, or such other punishment as a cour
direct."

NINETEENTH ARTICLE.

Earlier Forms. This Article first appears i
1776, where it was provided that an officer or soldi
"presume to use traitorous or disrespectful wor
authority of the United States in Congress assembl
Government,) "or the Legislature of any of the U
which he may be quartered"—should be punish
manner as prescribed in the present form, except t
was made mandatory in the case of an officer.[2] Th

derived from the British code where the offence consisted in the use of "traitorous or disrespectful words against our royal person or any of our royal family." In the American Articles of 1806, the word *contemptuous* was substituted for "traitorous," and the provision in other respects assumed substantially the form in which it now appears.

Practice under the Article. The acts in violation of this Article which have formed the subject of military trials have been almost exclusively of a political character. The great majority of the cases were those of denunciatory language used in regard to the President or his administration during the late war of the rebellion.[1] No instance has been found of a trial upon a charge of disrespectful words used against Congress alone or the Vice-President alone, although in some examples the language complained of has included Congress *with* the President.[2] Only one case is known of an arraignment upon a charge of speaking disrespectfully of a Governor of a State,[3] (and in that the accused was acquitted,) and none of an alleged violation of the Article in assailing a State legislature.

Nature and Proof of the Offence. The "words," (which need not, of course, be addressed *to* the President, &c., or uttered in his presence,) may be either spoken, or written—as in a letter, or published—as in a newspaper. They may consist in abusive epithets, denunciatory or contumelious expressions, intemperate or malevolent comments upon official acts, &c. Although the mere fact that no disrespect was *intended* will not constitute a defence to a charge under the Article, yet in a case where the words are not in themselves necessarily disrespectful, the *animus* of the accused in using them will be a circumstance material to the in-

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ious matter against the Government of the United States, or either House of Congress, or the President, with intent to defame or to bring to contempt or disrepute,' &c.

1. See cases in G. O. 377 of 1863; Do. 171, Army of the Potomac, 1862; Do. 23, Id., 1863; Do. 52, Middle Dept., 1863; Do. 119, Dept. of the Ohio, 1863; Do. 33, Dept. of the Gulf, 1863; Do. 68, Dept. of Washington, 1864; Do. 86, Northern Dept., 1864; Do. 1, Id., 1865; Do. 29, Dept. No. Ca., 1865.

2. G. O. 23, Army of the Potomac, 1863; Do. 119, Dept. of the Ohio, 1863.

3. G. C. M. O. 567 of 1865.

quiry whether any offence, or what degree of offence, has bee committed. Thus an adverse criticism of the Executive e pressed in emphatic language in the heat of a political discussio but not apparently intended to be personally disrespectful, shoul not in general be made the occasion of a charge under this Art cle.[1] In a case of spoken words, it will also be a material que tion whether they were uttered in a private conversation or i the presence of officers or enlisted men. Opinions for which, privately indulged in, an officer or soldier would not be answe able, may constitute, if publicly declared, the offence under co sideration. And any disrespect will be aggravated by being ma ifested before inferiors in rank in the service.[2]

To constitute the offence of speaking, &c., disrespectfully c the President, the official referred to must be the acting Preside at the time. Maligning a deceased President would not be withi this Article. Thus the public exulting over or justifying of th assassination of President Lincoln—an offence which was in sev eral instances, toward the end of the late rebellion, made the sub ject of trial by court-martial,[3] was properly charged as a violatio of Art. 99.

It would not constitute a *defence* to a charge under this Article, to show that the person was spoken of, &c., not in his official but in his individual capacity; or to show that what said or written of him was true. If the words are contemptuous or disrespectful *in se*, the offence is complete.

TWENTIETH ARTICLE.

Construction—*"Who behaves himself."* The original Article of 1775 made punishable a behaving with disrespect to ward a commander, and a speaking of false and injurious words in regard to him. Because specific reference to the *use of words* is omitted from the present form, it is not to be inferred that this mode of showing disrespect is no longer recognized. On the con-

1. "To seek indeed for ground of offence in such discussions would ordinarily be inquisitorial and beneath the dignity of the government." Judge Advocate General Holt. DIGEST, 7. It would, ordinarily, be still more inquisitorial to look for the same in a private conversation.

2. See G. O. 171, Army of the Potomac, 1862; Do. 29, Dept. of No. Ca., 1865.

3. See cases in G. O. 88, Dept. of Pa., 1865; Do. 105, Dept. of the Mo., 1865; Do. 50, Northern Dept., 1865.

ary, the term retained—"who behaves himself with disrespect," c., is sufficiently general and comprehensive to include all kinds personal disrespect, whether by acts or words. As it is said of e Article in a General Order:[1]—"It contains no qualifications to manner, time, or place, and is understood to cover," not erely "all actions," but also "language spoken or written." his construction is confirmed in practice: indeed prosecutions ıder this Article are more frequently based upon the use of ıbecoming language than upon any other form of misconduct.

"With disrespect." As expressed in the Order last cited, e disrespectful behaviour contemplated is such as "detracts from e respect due to the authority and person of the commanding ficer." Disrespect by *words* may be conveyed by opprobrious ıithets or other contumelious or denunciatory language applied the commander; by an open declaration of an intention not obey his orders; by making unwarranted imputations against ım or attributing to him improper motives; by misrepresenting aspersing him in a communication addressed to his superior other officer in authority, or in a circular, newspaper, or other ırm of publication,[2] &c. Disrespect toward a commander by *cts* may be exhibited in a variety of modes—as by neglecting he customary salute,[3] by a marked disdain, indifference, insolence, mpertinence, undue familiarity, or other rudeness in his presence, y a systematic or habitual disregard of, or delay to comply with, ıis orders or directions or by issuing counter orders, by an assault ıpon him not amounting to breach of the 21st Article,[4] &c.

The words or facts constituting the alleged disrespect, (and hich should be specifically set forth in the charge,) need not ecessarily consist in acts or language directed at the commander his *official* or *military* character, but may be applied to him *rsonally* as well.[5] As indicated under Art. 19, it is no defence

1. G. O. 44, Dept. of Dakota, 1872. And see DIGEST, 8.

2. See Hough, (P.) 125–127; also cases reported by James, (p. 357,) ıd Samuel, (p. 248,) of Capt. Brown and Lieut. Zouch, dismissed for ing concerned in a publication "having for its effect to excite public inion against their commanding officer." And see cases of violation this Article in G. C. M. O. 28 of 1875; G. O. 47, Dept. of the Platte, 870.

3. Hough, (P.) 125.

4. See G. O. 53, Dept. of Dakota, 1871.

5. Hough, (P.) 126; O'Brien, 68; Capt. Chamberlayne's Case, reported ı James, (p. 307,) and Samuel, (p. 246;) G. O. 44, Dept. of Dakota, 1872.

that the superior was assailed in his private or civil c
the law of military discipline cannot safely recognize su
tinctions.

It is also not essential that the disrespect be *intenti*
failure to show a proper respect to the commander, t
ignorance, carelessness, bad manners, or no manners, may,
with a deliberate act, constitute an offence under the .
Where, however, it is doubtful whether an act, or langua
necessarily disrespectful *in se*, may properly be treated as a
ing to disrespect, the *animus* of the party becomes a r
inquiry.[1] Where an impropriety of manner or expressio
being animadverted upon by the commander, has been *r*
an intention to be disrespectful will be the more readily i
An intentional disrespect is of course much more aggravat
one which is unintentional: a disrespect is also aggravate
it is *publicly* committed; and so of disrespectful language
ing *false* imputations. It is no defence, however, to a ch
using such language, that the same only stated *facts*,[2]
what was said was no more than *deserved* by the superior.
officer or soldier has been aggrieved by his commander, he
instead of inveighing against him, properly seek redres
the 29th or 30th Article of War, or otherwise through
military channels.[3] Further it is no defence, or even pal
that the person guilty of the disrespect was an officer
rank and long service. Indeed this circumstance is vie
Hough[4] as a "strong aggravation, inasmuch as the effect
conduct upon others must produce an influence pernic
proportion to the deference and respect paid to the chara
the individual who offends."[5]

The punishment being made discretionary by the Artic
be measured by the nature and circumstances of the dis
in the particular case; a severer penalty being called for
the disrespectful behaviour was unprovoked, undeserved

1. See O'Brien, 68.

2. 'But if the accused can clearly show not merely that his
tions are *true*, but that *it was his duty to express them*, it might
ferent.' O'Brien, 69.

3. O'Brien, 69. And see G. O. 47, Dept. of the Platte, 1870.

4. Precedents, 130.

5. It is also held an aggravation of the offence that the *comm*
an officer of especially high rank and station. Samuel, 245; O'Br

deliberate, violent, or public—as in the presence of officers or soldiers, than where it was the reverse.[1]

"Toward." As already indicated, it is not essential to the offence that the language should be addressed to the commander in person, or that the words or acts should be said or done in his presence. "'Toward" thus includes not only *to*, but *at*, *against*, or *in reference to*. Disrespectful language used in regard to a commander, in his absence, has been expressly held in Orders[2] to be within the Article. But where the language was employed in the course of a private conversation, it will in general be inquisitorial, inexpedient, and quite unworthy the Government, to make it the occasion of a charge, unless the disrespect was of an extreme character, and manifested under such circumstances as to set a pernicious example to inferiors or otherwise gravely prejudice decency or discipline.[3]

"His commanding officer." The Article, in its present form, is not, as in the early codes, confined to cases of disrespect shown to the General of the army or other chief commander, but includes offences of this class committed against all commanding officers of whatever degree, whether of a company, regiment, brigade, division, department, or other command. But comprehensive as is the term "his commanding officer," it can apply only to an officer who is the actual commander of the accused at the time of the offence. The commanding officer of an officer or soldier, in the sense of the Article, is properly the superior who, in the exercise of his command, is authorized to require obedience to his orders from such officer of soldier.[4] The offence, therefore, of showing disrespect to an officer, who, while the *superior*, was not the commander of the offender, would not be cognizable

1. It may be noted that this is one of the few Articles under which the sentence to make an *apology*, or to *ask pardon*, has been found appropriate in practice; the matter which has given rise to the charge being not unfrequently a *personal* one between the parties. See Col. Debbeigg's case, in Samuel, 244–5, and 2 McArthur, 358–360; cases of Surgeon Dalzell and Capt. Brown, in James, 56, 59; O'Brien, 68; also Chapter XX—"Apology."

2. G. O. 44, Dept. of Dakota, 1872; Do. 47, Dept. of the Platte, 1870. In the case in the former of these Orders, the disrespectful language was used in public at the Trader's store.

3. See G. O. 29 of 1844.

4. See DIGEST, 8; G. C. M. O. 37, Dept. of Texas, 1884.

under this Article, but should be charged under some other, as the 62d.[1] And so of the offence of using disrespectful language toward the usual commander of the accused—as the commander of his company or regiment—committed by the accused when on *detached service or duty* under a quite different, though temporary commanding officer;[2] such offence too should be charged under an article other than the Twentieth.

TWENTY-FIRST ARTICLE.

Origin. This important Article has come down to the present time from Art. 1 of Sec. III of Charles I, and Art. 15 of James II.[3] Since its first appearance in our law as Art. 7 of 1775, it has undergone but slight modifications: these, so far as material, will be noticed as we proceed.

Construction—*"On any pretence whatsoever."* These words, while emphasizing the description of the grave offences made punishable by this Article, do not add to its legal effect, or preclude the possibility of a defence to a charge under the same. Like the same words which appeared in the original of Art. 22, but were omitted in the form of 1806 and have since been disused, they might also be omitted from the present Article without modifying its purport or operation.

"Strikes." A *battery* is evidently here intended. The person of the officer must be reached by the blow: to strike *at* him without touching him is not the offence indicated, but a mere assault only.[4] Upon this word Hough[5] observes: "The act of striking is sufficient; it does not signify whether it be with the fist, or with a stick, or any other weapon, or whether it be a gentle or a hard blow; the mere striking constitutes the crime." The

1. In G. O. 53, Dept. of Dakota, 1871, a conviction is disapproved because it was neither alleged nor shown that the officer offended against "was the commanding officer of the prisoner at the time of the commission of the offence." And see O'Brien, 68, 69.

2. DIGEST, 8.

3. See Appendix. The several provisions of the Article are also to be traced in Arts. 18, 19, 21, 22, 24, 25, 26, 29 and 30, of the Code of Gustavus Adolphus.

4. See the definition of Assault-and-Battery under the "Fifty-Eighth Article," *post.*

5. Page 84; Id., (P.) 79.

ıg must however be intentional; an accidental blow or ſt would not constitute the offence contemplated.
ɜ not unfrequently said by writers and in Orders that the ıg of a military superior by an inferior cannot be justified any circumstances or by any provocation whatever. The ı of an officer should indeed be sacred to the soldier; in an ne case, however, a soldier may be warranted in using force ɜt his officer, as when acting in self defence against illegal ıce, or in quelling a disorder under Art. 24; and in any case ſt of a resort to undue force by a superior against an inferior e admissible in evidence as going to palliate the offence of tter in employing force in return.[1]

raws or lifts up any weapon against." Here, how-ıre intended simple *assaults;* the offence consisting either ıere threatening of violence without anything further being sed, or in an attempt to do violence which is not effectuated. 'eapon chiefly had in view by the word "draw" is no doubt vord; the term however might apply to a bayonet in a ı, or to a pistol; and the drawing of either in an aggressive ɜr, or the raising or brandishing of the same minaciously presence of the superior and *at* him, is the sort of act con-ated. The raising in a threatening manner of a fire-arm, her or not loaded,) or of a club, or any implement or thing ıich a serious blow could be given, would be within the ption—"lifts up."

ffers any violence against him." Samuel[2] construes ·" as synonymous with the same word in the term, formerly ɔyed in our own Article as well as the British, "offer to " and therefore as referring only to an attempt to do violence, ıere exhibition of violence, without the consummation of ɜrt violent act, *i. e.* as an assault simply. O'Brien[3] appar-considers the term "offer violence" as indicating actual ce, and offer as meaning do or commit. It is deemed the able view to regard the phrase, as employed in our Article, ɜneral and comprehensive one, including violence proposed l as violence committed—assault as well as battery, as indeed

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ee G. C. M. O. 45, Dept. of Dakota, 1880.
ages 275, 277.
ıge 81.

"His superior officer." By the term "su in this part of the Article, is clearly meant an superior to that of the offender—or, where an enl offender, any commissioned officer whatever—wh officer be, properly speaking, a *commanding* offi cle, as remarked in the DIGEST,[3] is thus "broade which relates to offences against commanding of

"Officer"—it need hardly be observed—mea where in the code, commissioned officer.[4] An a upon a non-commissioned officer, (or disobedien of one,) by a soldier, is properly charged under

To warrant a conviction, it should appear that *aware* that the person assailed by him was his s If the latter was an officer of the same compa garrison, or if he wore a uniform indicating his r may in general be presumed to have known or was such superior. If the officer was not thus r able, as where he wore no distinctive uniforn offence was committed in the night time, it will the circumstances, as they appear in the testimo accused shall be deemed to have had the know requisite. In an encounter with an aggressive night, or under circumstances in which he is recognized, the superior will properly at once ar is, with his rank, &c., and the fact that he did so

nce, as part of the *res gestæ*, upon the trial of the subordi-
for an offence under this Article.[1] The officer will of course
esumably a *commissioned* officer from the fact of his acting
ch, in connection with the further fact that all the officers
r army are equally and alike commissioned officers.

n the execution of his office." This term has sometimes
defined by the more familiar expression "on duty." But
ficer may be in the execution of his office without being on
in the strictly military sense, and a more accurate defini-
of the phrase is believed to be—in the performance of an act
ity either pertaining or incident to his office, or legal and
opriate for an officer of his rank and office to perform. An
r is deemed to be in the execution of his office when en-
d in any act or service required or authorized to be done by
by statute, regulation, the order of a superior, or military
:.[2] It is not essential that the act should be one pertaining
s special branch of duty: thus any officer engaged in quell-
fray or disorder under the provisions of Art. 24 would prop-
be regarded as "in the execution of his office." There are
in officers especially charged by their commissions with the
itive authority of a command, with whom to be on duty and
execution of office is the general rule of the military status—
st, regimental or company commanders. But any officer,
ver special his function, when called upon in an emergency
the part of a military superior, will be "in the execution
s office" in the sense of the present Article.

*Disobeys any lawful command of his superior offi-
—Obedience to orders in general.* The importance of
21 is owing mainly to the fact that it makes punishable the
ic and capital offence of Disobedience of Orders. Obedience

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n G. O. 34, Dept. of Va., 1863, a conviction of a soldier upon a
e of offering violence to his superior officer was disapproved by
Dix, upon the ground, (in part,) that the officer assailed "did not
to the same regiment with the accused, was not in uniform, nor
wear any badge of office;" and because it was "not shown that
cused knew him to be an officer, or that he declared himself to

immons § 174; Hough, 83; Id., (P.) 79; O'Brien, 81–2; Benét,

to orders is the vital principle of the military life[1]—the mental rule, in peace and in war, for all inferiors through grades from the general of the army to the newest recruit.[2] rule the officer finds recited in the commission which he a and the soldier, in his oath of enlistment, swears to obse As in the British system all military authority and discipl derived from one source—the Sovereign,[3] so in our army ev perior, in giving a lawful command, acts for and represe President, as the Commander-in-chief and Executive powe Nation, and the source from which his appointment and au proceed.[4] Hence the dignity and significance of a forma tary order, and hence the gravity of the obligation which poses upon the inferior to whom it is addressed. The obl to obey is one to be fulfilled without hesitation, with alacri to the full;[6] nothing short of a physical impossibility ord

1. "Obedience to command is the chief military virtue, in rel which all others are secondary and subordinate;" it is, for the "the first great bond or charter of his service." Samuel, 2 "The first and last virtue of a soldier." Harcourt, 16. "T second, and third part of a soldier is obedience." Sutton *v.* Jol 1 Term, 546. "The first duty of a soldier is obedience, and this there can be neither discipline nor efficiency in an army." *v.* McDowell, Deady, 244. And see Trammell *v.* Bassett, 24 A "No other obligation must be put in competition with this; neit ental authority, nor religious scruples, nor personal safety, nor p advantages from other services. All the duties of his" (the s "life are, according to the theory of military obedience, absc that one duty of obeying the command of the officer set ove Clode, 2 M. F., 37. And see remarks of Secretary of the Na C. M. O. 1, Navy Dept., 1882.

2. "The inferior in place, whether standing one or one hundr below his superior, is bound to show implicit obedience to t mands of the latter." Harcourt, 13–14.

3. Clode, M. L., 107.

4. The following extract from Samuel, (p. 283,) is equally appl our military system:—"The Constitution has submitted the actic army to be directed and controlled in everything by one supre mander, from whom, by a number of communicating branches, tinued, uninterrupted and unabated stream, all orders are mad to the individuals, near or remote, attached to the military stat orders, as they partake all alike of the essence of supreme c every officer or soldier is obliged implicitly to obey." To wh be added from Clode, (M. L., 74,)—"All orders of subordinates consistent with supreme authority, and, in case of conflict, that obeyed which is imposed by the higher authority."

5. "A military subordinate is compelled to an unhesitating c to the very letter of the command received or order issued." I

ing a complete performance.[1] While a certain discretion in :ecution of an order may sometimes be permitted to officers in rank or command, or officers charged with expert or pe-ly responsible duties,[2] the inferior cannot, as a general rule, rmitted to raise a question as to the propriety, expediency, ısibility of a command given him, or to vary in any degree its terms.[3] Even where the order is arbitrary or unwise, and ect must be injurious to the subordinate, he should first obey, oning till after compliance his complaint and application for ss.[4]

"A subordinate, on receiving an order, must obey promptly and itly, * * * must at once comply. * * * In presence of the , more particularly, is this mechanical obedience due." O'Brien, And see Simmons § 595; De Hart, 165. The obedience must be plete and undeviating." Samuel, 287. In the military service, ompt and unhesitating obedience to orders is indispensable to a ete attainment of the object. * * * Every delay and every le to an efficient and immediate compliance tends to jeopard the interests." Martin *v.* Mott, 12 Wheaton, 30.

utton *v.* Johnstone, 1 Term, 546.

ee Hough, 88, (note 47,) 633. But where a discretion is taken art materially from the terms of an order, the officer makes him-ıenable to charges, in case the result does not justify his action. of Lord Nelson's proceeding at Copenhagen, in not complying is superior's signal to return and not engage the enemy, which d in a victory, Hough observes that, 'if he had *failed*, he would een brought to trial by court-martial.'

If it were open to a soldier to be the judge of the propriety of lers given him, there would at once be an end of all military dis-." Harcourt, 14. "In military affairs it would be intolerable." M. L., 75. "A subordinate officer must not judge of the dan-opriety, expediency, or consequence of the order he receives." *v.* Johnstone, 1 Term, 546. "While subordinates are pausing sider whether they ought to obey, or are scrupulously weighing idence of the facts upon which the commander-in-chief exercises ht to demand their services, the hostile enterprise may be accom-l without the means of resistance." Martin *v.* Mott, 12 Wheaton, oldiers should obey "without cavil or inquiry;" they "have no o inquire of their superior officer as to the object of a detail upon they are ordered by him." Riggs *v.* State, 3 Cold. 90. And see l *v.* McDowell, Deady, 244–5; Dinsman *v.* Wilkes, 12 Howard, Trammell *v.* Bassett, 24 Ark. 499; II Opins. At. Gen., 713.

Soldiers may complain of the command of a superior, but they und in the first instance to obey." Samuel, 265. "The orderly oper course in all cases is to obey orders and afterwards, if any ip or oppression is practiced, appeal to superior authority for re-' G. O. 40, Army of the Potomac, 1862. And see Harcourt, 16; n, 82; G. C. M. O. 28, 87, Dept. of the East, 1871.

The disobedience contemplated by the Article. It is agreed by the authorities that the offence specified in this part of the Article is a disobedience of a positive and deliberate character. However it may be exhibited,—whether in the form of an open and express refusal to do what is ordered, or in a simple not doing it, or in a doing of the opposite, or in a doing of something which has been expressly forbidden to be done,—the disobedience must be wilful and intentional. A mere *neglect* to comply with an order, through heedlessness, remissness, or forgetfulness, is an offence chargeable, not in general under this Article but under the 62d.[1]

The command or order. It is also agreed by military writers that the "command" contemplated by the Article is an express and personal one, that is to say an order of a specific character, addressed or given to the accused in person, in contradistinction to one of a general scope, as one issued to the command of which the accused is a member and applying to him no more than the rest.[2] Thus a failure to comply with the general or standing orders of a department, district, post, &c., or with the Army Regulations, is not an offence under this Article, but

1. "To support this charge, it is essential that there should be shown such an intentional disregard of authority as is evinced by a wilful refusal or omission to comply with the specific command of a superior officer." G. C. M. O. 26 of 1872. "There must be an intentional disobedience or defiance of authority. * * * The capital offence is not complete by mere neglect or forgetfulness." Simmons § 17[illegible]. And see Samuel, 286; Hough, 89; Id., (P.) 105; Harcourt, 21; Bombay R., 132, 155; Manual, 19; O'Brien, 84; G. C. M. O. 80, Dept. of the East, 1871; Do. 51, Id., 1872; Do. 112, Dept. of the Mo., 1872; Do. 12, 61, Id., 1873; G. O. 85, Dept. of the South, 1873; Do. 61, Id., 1873; Do. 13, Dept. of Cal., 1873; Do. 24, 35, Fifth Mil. Dist., 1868. To be wilfully disobeyed, the order must of course be *understood;* "and if there is doubt in the mind of the court on this point, the prisoner should have the benefit of it." G. O. 68, Div. of the Atlantic, 1875. The express orders should never be given to a soldier when under the influence of intoxicating drink, has been repeatedly insisted upon in Orders. See G. O. 58, 63, Dept. of the South, 1873.

2. Simmons § 178; Bombay R., 132; O'Brien, 84; G. O. 61, Dept. of the South, 1874. Other persons may indeed be included in the order provided it contains a distinct and direct mandate upon the individual who afterwards becomes the accused. Thus it has been held an offence under this Article for an officer to refuse or omit, of his own will, to act as a member of a court-martial for which he has, with others, been specifically detailed. G. O. 43 of 1833.

the 62d.[1] And so of a non-performance by a subordinate y mere routine duty.[2]

to the *form* of the order,—this is immaterial[3] provided that bstance amounts to a positive mandate.[4] Mere instructions l not in general fulfill the definition of an order or "com- ," in the sense of the present Article;[5] nor would a mere nent of his wishes and views by a superior, however point- mpressed upon the inferior in his entering upon the duty.[6] rder may be oral or written;[7] it may be communicated or red to the subordinate by the superior in person, or through d party—as a staff officer; or—provided of course it is per- , referring specifically or clearly to the individual and im- g upon him an express duty—it may be conveyed through nedium of the General or Special Orders of the command ar Department.

to orders *conveyed through a third person*,—it is to be re- ed that, as several times observed in the course of this se, all orders issued by the Secretary of War are presumed issued by the direction of the President and are his in law. rders emanating from the War Department, Headquarters Army, or Headquarters of a Division or Department, sub- d by the Adjutant General, an Assistant Adjutant General, er staff officer, are to be presumed to be the orders of the tary of War, (representing the President,) the General of rmy, or the Division or Department commander, as the case e. But wherever orders are thus vicariously issued through

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. C. M. O. 26 of 1872; Do. 7, Dept. of Texas, 1874; G. O. 24, th Mil. Dist., 1868; Simmons § 178.

. O. 24, Fifth Mil. Dist., 1868; O'Brien, 84.

'Brien, 84; Pollard *v.* Baldwin, 22 Iowa, 333; Cowell *v.* Hopkin N. H. 14; State *v.* Small, Smith's Reports of Militia Cases, 57.

ee O'Brien, 84.

IGEST, 10.

ut if an order be actually given, it is no less to be obeyed though sed in a courteous instead of a peremptory form. G. C. M. O. 883.

amuel, 285; O'Brien, 84. The order may be contained in a tele- Though a written order be informal, or do not contain the name person, or address him by a wrong name, yet if such that it can- sonably be misunderstood as an order to himself, it will be within templation of the Article. Compare State *v.* Small and State *v.* mith's Militia Cases, 57, 83.

a *military* representative, it should be e
of the communication that they are iss
proper superior, or the words—"*By o*
mander, (naming him and his comma
the signature.[1]

An order is not rarely transmitted th
commanders, or other officers, to the
reached: a failure to comply in such a
the command of the superior from wh
proceeded.[2]

Where an order is conveyed and per
officer, aid-de-camp, or other messenge
liable under the present Article if he f
that he should be apprized that the be
superior whose the order purports to b
informed upon this point, the declarati
that he is the staff officer, aid, &c., of
livers the order by the direction of s
sumed to state the fact, and the recipie
in complying with the order thus con
a charge under the present Article if l

As to an order *published*,—the same,
ner usual at the post or station, as by be
public occasion,[5] is ordinarily presume
the accused and thus binding upon hi
obligation on the ground that he was
the burden of proof will commonly b
by reason of authorized absence or othe
to be advised of such order before t
within which it was required to be exe

1. See par. 664, Army Regs. Assumin
der of a superior, who has not in fact direc
hardly be remarked—a grave military offe

2. The omission of an intermediate co
transmittal will not affect the force of the
of the South, 1864.

3. See O'Brien, 85.

4. See O'Brien, 85. The transmissio
through a non-commissioned officer does n
G. O. 91, Dept. of Ark., 1864.

5. Compare the old custom of publishin
and trumpet, that no man may pretend ign
tavus Adolphus; Do. 63 of James II.

awful command." The word "lawful" is indeed sur-
ge, and would have been implied from the word "command"
, but, being used, it goes to point the conclusion affirmed by
e authorities that a command *not* lawful may be disobeyed,[1]
itter from what source it proceeds.[2] But to justify an in-
in disobeying an order as illegal, the case must be an ex-
one and the illegality not doubtful.[3] The order must be
y repugnant to some specific statute, to the law or usage of
ilitary service, or to the general law of the land.[4] The un-
.ness of the command must thus be a *fact*, and, in view of
:neral presumption of law in favor of the authority of mil-
orders emanating from official superiors,[5] the *onus* of es-

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amuel, 284; Simmons § 595; Prendergast, 54; Harcourt, 50;
en, 82, 267; De Hart, 166; DIGEST, 9; Sutton *v.* Johnstone, 1 Term,
U. S. *v.* Carr, 1 Woods, 480; Olmstead's Case, Brightly, 28; Peo-
McLeod, 1 Hill, 426; Riggs *v.* State, 3 Cold. 85; State *v.* Sparks,
xas, 632.

State *v.* Sparks. That an illegal order emanating from the Presi-
r Secretary of War can confer no authority, see Little *v.* Barreme,
ich, 179; Eifort *v.* Bevins, 1 Bush, 460; Com. *v.* Palmer, 2 Bush,

amuel, 287; Hough, (P.) 104; Prendergast, 54; Harcourt, 20;
n, 83; De Hart, 166; II Opins. At. Gen., 713; DIGEST, 9; Riggs
e, 3 Cold. 86.

amuel, 284; Hough, (P.) 104; Simmons § 595; Harcourt, 20;
:rgast, 54; O'Brien, 267; De Hart, 166; G. C. M. O. 86, Dept. of
865; Riggs *v.* State, 3 Cold. 85; Terrill *v.* Rankin, 2 Bush, 453.
following orders have been held to be *not* "lawful" in the sense
Article:—An order given by a company commander to a soldier
e his washing done by a particular laundress. G. C. M. O. 87,
of the East, 1871: An order requiring a soldier to assist in build-
rivate stable for an officer. G. C. M. O. 130, Dept. of Dakota,
An order requiring a soldier to act as an officer's servant. DI-
10: An order forbidding a soldier to contract marriage. ID.: An
equiring a post band to play in a neighboring town for the pleas-
he citizens. ID. "A superior officer has no right to take advan-
his military rank, to give a command which does not relate to
y duty or usages, or which has for its sole object the attainment of
rivate end. Such a command is not such a lawful command as
ike disobedience to it criminal." Manual, 19. Interesting naval
nvolving the legality of orders given to officers are published in
140, Navy Dept. 1869, (Ast. Surg. Green's case,) and Do. 182,
73.

code of Gustavus Adolphus makes punishable, as a specific mili-
ence, the giving of an unlawful command. See his Arts. 27 and
l compare his Art. 45.

ee De Hart, 297; O'Brien, 302; G. O. 34 of 1852.

tablishing this fact will, in all cases—except where the o palpably illegal upon its face—devolve upon the defen clear and convincing evidence will be required to rebut t sumption.[1]

The legality of the order may depend upon the period, one of peace or war, (or other emergency,) at which it is An order which would be unlawful in peace or in the of any public exigency, may be perfectly lawful in war a justified by the usages of civilized warfare.[2] Thus an o the seizure of citizens' property for the subsistence or tra tion of the troops, the construction of defences, &c., or destruction to facilitate the operations of the army in th or to prevent its falling into the hands of the enemy, w not only authorized, but to disobey it would be a grave r crime. But, in general, in time of peace an order simi disregard of private right would be repugnant to the firs ciples of law, and to fail to obey it would constitute no vi of the present Article.[3]

But while a military inferior may be justified in not ol an order as being unlawful, he will always assume to do his own personal responsibility and at his own risk.[4] Even there may *seem* to be ample warrant for his act, he will, in fying, commonly be at a very considerable disadvantage, th sumption being, as a rule, in favor of the legality of the or an executive mandate, and the facts of the case and reason the action being often unknown in part at least to himself a the possession only of the superior. In the great major cases therefore it is found both safer and wiser for the inf instead of resisting an apparently arbitrary authority, to a the alternative of obeying even to his own detriment, thu placing himself in the most favorable position for obtainir dress in the future.[5] On the other hand, should injury to a

1. Samuel, 284; O'Brien, 82; De Hart, 297.

2. O'Brien, 83; Olmstead's Case, Brightly, 9.

3. Compare Mitchell *v.* Harmony, 13 Howard, 115, and 1 Blat 549; Koonce *v.* Davis, 72 No. Ca. 218; Yost *v.* Stout, 4 Cold Christian Co. Ct. *v.* Rankin, 2 Duv. 502; Keighley *v.* Bell, 4 F Fin. 790, and other cases cited in PART III.

4. 2 Clode, M. F., 37; G. O. 28 of 1851; Do. 34 of 1852; DIGE State *v.* Sparks, 27 Texas, 633.

5. O'Brien, 82; G. O. 40, Army of the Potomac, 1862. And c People *v.* Gaul, 44 Barb. 107–8.

son, or damage to the United States, result from the execution an order by a subordinate, the plea that he acted simply in dience to the mandate of his proper superior will be favored at itary law, and a court-martial will almost invariably justify . protect an accused who has been exposed to prosecution by son of his unquestioning fidelity to duty, holding the superior ne responsible. How far he will be protected by the civil trials, if sued or prosecuted on account of a cause of action or nce involved in his proceeding, will be considered in PART III his treatise.

Injust or objectionable commands. That the order was rely unjust or unreasonable would, it need hardly be added, istitute no defence to a charge of disobedience of orders under s Article.[1] The plea that the order was opposed to the religs scruples of the accused, and that he was therefore warranted disregarding it, is one which has been considerably discussed England, where it was held wholly insufficient as a defence.[2] would of course be held equally untenable in our practice.

. In the *militia* case of State *v.* Woodman, Smith, 25, 31, it was held t to entitle a superior to obedience from a subordinate, "his comnd must be lawful *and reasonable.*" It need hardly be said that no h theory of military obligation could be allowed to prevail in the ay. In a recent case it was held to be no excuse for not obeying the lers of a superior on drill, that such orders, in the opinion of the inor, were improper and incorrect as not being in compliance with the ablished tactics. G. C. M. O. 134, Dept. of Dakota, 1884.

. See Capt. Atchison's case, Clode, 2 M. F., 37, 66–7; Hough, (P.) –117. In the debate upon this case in Parliament the Duke of Wellton said: 'If an officer or any other member of the army is to be wed to get rid of the discharge of a disagreeable duty upon such a a, there is an end of all discipline in the army.' Hough, (P. 118,) in ng a further case of an officer in India who declined to go into the ches on Sunday, expresses himself as follows:—"Every one must nit that if an officer will refuse to obey orders, because they may be trary to his religious belief regarding the Holy Scriptures, he is unfit remain in the army. The real Christian is that person who does his ty to his sovereign and to his country without demur. If his conence be unsettled, he should quit the army at once, and not unsettle affairs military." And he adds—"Many battles have been fought a Sunday." See also Manual, 20; Pratt, 125. And compare in this nection Reynolds *v.* U. S., 98 U. S. 145, to the effect that a person's igious belief cannot be accepted as a justification of his overt violan of the criminal law of the land.

"His superior officer." This i
as here employed than where first oc
"superior officer" here intended mu
the *order;* else indeed his comman
one. Thus an officer of the general
very considerably a certain other offi
line officer, without being authoriz
stances to give an order to either.
templated by the Article will thus in
ing officer; but he need not be th
regiment, post, department, &c.: it i
upon whom the command has tempo

To constitute the specific offence
violation of Art. 21, the "superior
known to be such by the accused, at
order which is not obeyed.

XI. THE TWENTY-SECOND, TWENTY-FOURTH

[MUTINY, SEDITION A

"ART. 22. *Any officer or soldier*
joins in any mutiny or sedition, in
party, post, detachment, or guard, sh
punishment as a court-martial may

"ART. 23. *Any officer or soldier w*
tiny or sedition, does not use his utm
same, or having knowledge of any
does not, without delay, give informat
officer, shall suffer death, or such othe
tial may direct.

"ART. 24. *All officers, of what*
to part and quell all quarrels, fr
among persons belonging to his own

1. See G. O. 7, Dept. of the Mo., 1867
the officer giving the order is the superi
sense of this Article, the offence may p
62. As was properly done in a recent c
the Mo., 1885, of a soldier who, when a
ing directed by the medical officer in ch
minor operation, refused to undergo the

op, battery, or company, and to order officers into arrest, and n-commissioned officers and soldiers into confinement, who take rt in the same, until their proper superior officer is acquainted rewith. And whosoever, being so ordered, refuses to obey such cer or non-commissioned officer, or draws a weapon upon him, ll be punished as a court-martial may direct."

TWENTY-SECOND ARTICLE.

Origin. This and the following Article may be traced to Art. Sec. II of Charles I, Art. 8 of the Parliamentary Code of the rl of Essex, and Art. 13 of James II: various forms of the nce of mutiny were also made capitally punishable by Arts. 65, 75, 78 and 120, of Gustavus Adolphus.

Its Principal Subject. The form of this Article, as of the s which follow it, has undergone no considerable change since 75.[1] Of the acts which it makes punishable, the principal, *utiny*, has commonly been characterized as the gravest and most minal of the offences known to the military code.[2] It has also historical significance; the well-known mutiny of Jacobite troops 1689[3] having given rise to the Mutiny Act, which for nearly s hundred years constituted the statutory military law of Great tain.

Mutiny Defined. Mutiny has been variously described, but general not in such terms as fully to distinguish it from some er military crimes, the characterizing *intent* not being suffi-ntly recognized.[4] It may, it is believed, properly be defined consisting in an unlawful opposition or resistance to, or defi-e of superior military authority, with a deliberate purpose to vert or prevail over the same.[5]

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1. The omission in 1806 of the words "on any pretence whatsoever" already been noticed under Art. 21.

2. "It stands conspicuously in front of the line of military crimes." nuel, 249. "The most heinous known to military law." O'Brien, It can however scarcely be regarded as a graver offence than Mis-aviour before the enemy.

3. Referred to *ante*, in Chapter II, p. 8.

4. See the definitions of Samuel, (p. 253;) Simmons, (§ 170;) Thring, 175;) O'Brien, (p. 71, taken from Bombay R., p. 128;) and in G. O. 1837.

5. This is in substance the definition given by the author in DIGEST, II.

It is this intent which distinguishes it from the other offences with which, to the embarrassment of the student, it has often been confused both in treatises and General Orders. Thus, disrespect toward a commanding officer, the offence which is the subject of Art. 20, has sometimes been charged as mutiny.[1] More frequently the doing or offering of violence to a superior officer and disobedience of orders,—offences specifically made punishable by Art. 21,—have been so charged or considered.[2] Still more frequently has the designation of "mutiny" been erroneously attached to disorders of the class known as "mutinous conduct"—such as defiant behaviour or threatening language toward superiors, muttering or murmuring against the restraints of military discipline,[3] combinations of soldiers with a view to acts of violence or lawlessness which however are not committed, intemperate and exciting discussions at meetings held for the purpose of protesting against orders, declining to perform service in the honest belief that the term of enlistment has expired,[4] &c. Such disorders, stopping short of overt acts of resistance, or not

1. See Hough, 107; Id., (P.) 120.

2. Convictions, however, of such offences under the name of "mutiny" have been in some cases expressly disapproved. As in G. O. 10, Dept. of the Mo., 1863, where the offence consisted mainly in the striking of an officer by a soldier. In Lieut. Col. Fremont's case (G. O. 7 of 1848,) a finding of guilty of "mutiny" was disapproved by the President upon the ground apparently that the acts alleged under this charge constituted rather instances of disobedience of orders. Of course the offences specified in Art. 21, if committed in the deliberate purpose of subverting superior authority, would properly be chargeable as mutiny.

3. This "muttering or murmuring" is classed as mutiny by some of the earlier writers. See Samuel, 254 and note; Hough, 71.

4. As in the case of the Tennessee militia, treated and brought to punishment as mutineers by Gen. Jackson, in 1814. See *post*. And see the case in DIGEST, p. 12, of a body of volunteers which, having enlisted 'for the war,' (*i. e.* the war of the late rebellion,) refused, after active hostilities had terminated, to serve against Indians. Other instances occurred, during the late war, of volunteers, who, honestly believing that their contract had expired or that they could not otherwise legally be required to render further service, joined in refusing to serve and demanding their discharge. Such were in general cases of mutinous conduct, or disorder in violation of Art. 62, rather than mutiny, the true *animus* of mutiny not being present. See G. C. M. O. 521 of 1865; G. O. 32, Dept. of N. E. Va., 1861; G. O. 108, Army of the Potomac, 1862. A combination, however, to refuse to perform military service legally and properly required of the parties, if persisted in after due warning, &c., may certainly be treated as mutiny. See text *post*.

:erized by a deliberate intent to override superior author-
not constitute in general the legal offence of mutiny, but
nmonly to be treated as "conduct to the prejudice of good
nd military discipline" in violation of Art. 62.[1] And the
s to be said of disorderly conduct under the influence of
ation, which, though accompanied by resistance to a su-
is without the *animus* peculiar to mutiny in law.[2]
definition of mutiny at military law is indeed best illus-
›y a reference to the adjudged cases treating of that offence
ɜrstood *at maritime law.* Thus, in regard to mutiny or re-
American merchant vessels, it has been expressly held that
ntion to overthrow for the time at least the lawful authority
master is an essential element of the crime;[3] that simple
:e against the officer, without proof of intent to override
thority, is not sufficient to constitute revolt or mutiny;[4]
ere disobedience of orders, unaccompanied by such intent,
›t amount to mutiny;[5] and that insolent language or dis-
behaviour is *per se* insufficient to establish it.[6]

of of the Intent. The intent may be openly declared in
or it may be implied from the act or acts done,—as, for
le, from the actual subversion or suppression of the su-

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mmons, (§ 171,) referring to the "distinction between mutinous
t and mutiny," observes—"Mutinous conduct implies behaviour
: to mutiny: * * * a soldier whose conduct is evidently of a
us character may yet be clear of the completion or commission
offence." And see, as to the same distinction, Hough, 71; Id.,
; O'Brien, 79–80; DIGEST, 11. In G. O. 115, Dept. of Wash-
1865, Gen. Augur says: "The conduct of the prisoners, though
rly and riotous, does not constitute mutiny."

1 G. C. M. O. 73, Dept. of the Mo., 1873, Gen. Pope disapproves
ction of mutiny for the reason that the evidence showed that the
l was only "intoxicated, disorderly and disobedient." And see
ır case in G. O. 10, A. & I. G. O., Richmond, 1861.

. S. *v.* Kelly, 4 Washington, 530; U. S. *v.* Smith, 3 Id. 78; U. S.
es, 5 Mason, 277; U. S. *v.* Hemmer, 4 Id. 107; U. S. *v.* Thompson,
ıer, 171; U. S. *v.* Forbes, Crabbe, 560. And see XIV Opins. At.
89. In U. S. *v.* Haines, Story J. specifically compares the situa-
a ship's company to that of a military command.

S. *v.* Kelly, *ante;* U. S. *v.* Lawrence, 1 Cranch C. 94; U. S. *v.*
›n, 1 Sumner, 448; U. S. *v.* Almeida, Whart. Prec., 1061.

S. *v.* Smith; U. S. *v.* Haines; U. S. *v.* Thompson; U. S. *v.* Morri-
ıte; also U. S. *v.* Barker, 5 Mason, 407.

S. *v.* Kelly; U. S. *v.* Thompson—*ante.*

perior authority,[1] from an assumption c
longs to the superior,[2] a rescue or atte
a stacking of arms and refusal to marc
arms and assuming a menacing attitude

1. As in the case of Lt. Col. Johnston,
where the accused, putting himself at the
and imprisoned the military governor of N
the case, published in G. O. 15, Dept. of t
cers dismissed for mutiny in unlawfully ar
his command the commander of the post.
of the crew of the "Bounty," (1789,) t
seized, forced into a boat, and abandoned i

2. See cases in last note. Sec. 5360, Re
as constituting revolt and mutiny at maritir
of the crew" who "usurps the command
ter or other lawful officer in command ther
thority and command on board."

3. G. C. M. O. 513 of 1865; Do. 104, D
1866; G. O. 87, Army of the Potomac, 18
of the South, 1864; Do. 16, Dept. of Ala.
of the South, 1865; Hough, (P.) 66; U. S. *v*

4. See cases, published in G. O. 43 of 18
corporals, tried for stacking arms with ot
obey orders or do any military duty; also
1864; Do. 20, Dept. and Army of the Ten

5. See case in G. C. M. O. 227 of 1864,
wounded in the course of the mutiny;) I
officer was killed and two other officers w
mutineers ;) G. O. 131, Sixteenth Army
cused did, in company with other comrade
ers, take his arms and by force pass out of t
attempt to disperse an assembly of officers c
proper authority at a dwelling house nea
Div. of the South West, 1865; G. O. 16, D
accused, a first sergeant, fully armed and i
camp, with a mob of soldiers, and formed
before the camp of another regiment, for
surrender into their custody of a soldier of
been arrested by a guard from the other reg
to one of its officers ;) G. C. M. O. 104, De
Id., 1866, (where the mutineers assembled
ened the lives of their officers and offered
beside releasing a prisoner, "attempted t
tillery of the fort where they were on duty
(where an officer, with a body of soldiers,
powering the guard, assumed control of
provost-marshal and ordered the soldiers t
in G. O. 104, 243, of 1863; Do. 115, Dept.
M. O. 142, 147, 154, Dept. of the Mo., 186
In the historical case of the mutiny in

d from a variety of circumstances no one of which perhaps ıld of itself alone have justified the inference. But the fact of *bination*—that the opposition or resistance is the proceeding ı number of individuals acting together apparently with a ımon purpose[1]—is, though not conclusive, the most signifi- t, and most usual evidence of the existence of the intent in stion.

ıtent alone not Sufficient. While the intent indicated ssential to the offence,[2] the same is not completed unless the osition or resistance be manifested by some overt act or acts, pecific conduct. Mere intention however deliberate and fixed, onspiracy however unanimous, will fail to constitute mutiny.[3] rds alone, unaccompanied by acts, will not suffice.[4]

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une, 1783, the mutineers, (assembled in force,) menaced Congress lf with their demands for pay; so that that body was induced to nge its place of session to Princeton. 4 Jour. Cong., 231–236, 267– ; Hildreth, v. III, p. 436.

. In addition to the cases already cited, see instances of combina- ıs of soldiers to resist superior authority or not comply with orders— G. O. 136, Dept. of Washington, 1865, (where six soldiers jointly re- d to do guard duty;) G. C. M. O. 521 of 1865, (where thirty-four -commissioned officers and privates of a regiment jointly refused to in for drill or obey orders ;) G. O. 32, Dept. of N. E. Va., 1861, ere sixty-two non-commissioned officers and privates of the same iment "formally and positively, in the presence of their regiment, sed to do any further duty whatever," on the pretext that they were onger in the service ;) G. C. M. O. 130 of 1865, (where there was mbination of officers "to compel their commanding officer into a rse of action not in accordance with his judgment.") In the case e Tennessee militia, in 1814, over two hundred, including some offi- , abandoned the service and proceeded to their homes. See *post.*

That there can be no mutiny in the *absence* of the specific intent, is ingly illustrated in the case published in G. C. M. O. 50 of 1867, re, notwithstanding extreme acts of violence committed by the al- d mutineers, it was held by the reviewing authority that their con- t did not proceed from a mutinous disposition, but was induced by trageous treatment" on the part of one of their officers, and the sen- e imposed by the court was therefore remitted. And see case de- ed in DIGEST, 12.

xcuses, however, for conduct in the nature of mutiny are to be ac- ed with great caution, since actual mutiny, while it may be extenu- l by circumstances, admits of no legal *defence.* See "Punishment," t.

. U. S. *v.* Kelly, 4 Washington, 530; O'Brien, 72.

. Simmons § 170; Griffiths, 22; Benét, 258.

A Violent Act not Necessary. need not be active or violent.[1] It tl persistent refusal or omission, (with t obey orders or do duty.

The Resistance, &c., must be the superior when resisted is attem order,[2] or to enforce his authority b be mutiny to resist him. But the u be manifest and unquestionable to j ance, and what has been said unde bility assumed in disobeying a comn not lawful, is even with greater forc

A Combination not Essentia stitute mutiny it is not necessary th of several persons: a single individ and commit the act of mutiny.[4] As a combination is usual and indeed a which actuate mutiny being commor or complaint with a greater or less n

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1. Simmons § 170; O'Brien, 70, 71. Bache, Printed Trial, (1814,) where th simply declared, in the presence of thei to obey their orders, or submit to their United States; also U. S. *v.* Haines, 5 At maritime law, it has been held that a s compliance, (with the intent essential to stitute mutiny. U. S. *v.* Smith, 1 Maso 107; also U. S. *v.* Nye, 2 Curtis, 225; U.

2. See U. S. *v.* Smith, 3 Washington,

3. As where, at maritime law, the sup ence to orders by the use of a deadly v endanger life, when in fact no necessity ures. See U. S. *v.* Sharp, 1 Peters C. 1 & Minot, 311; U. S. *v.* Smith, *ante.*

4. "It is not necessarily an aggrega individuals, for it may originate and c * * * It may be as complete with or Samuel, 254, 257. And see Hough, 68; Hart, 348; Benét, 206; Harwood, 195; *Contra*—O'Brien, (pp. 70, 71,) who dis consideration the *intent* distinguishing may be guilty of mutiny at *maritime lau* *v.* Kelly, 4 Washington, 530, and 11 Wh

t, where it exists, need not necessarily be *preconcert;*[1] but, as tinies naturally grow out of previous consultations and conrings, it will generally be such.[2]

Sedition. This offence which, as designated in the present :icle, is by the earlier writers[3] nearly identified with mutiny, in the more recent treatises, distinguished as being a resistance the *civil power*, demonstrated by riot or aggravated disorder. us Simmons says:—"Sedition is supposed to apply to acts of :easonable or riotous nature, directed rather against the public ice and the civil authority than military superiors, though necarily involving or resulting in insubordination to the latter."[4] instance of a trial, under this Article, for sedition, as thus ined, is known to have ever occurred in our military history.[5]

The Specific Acts made Punishable by the Article— ***Who begins, excites, causes, or joins in, any mutiny,*** . Samuel[6] distinguishes in general terms the two classes of sons contemplated by the Article as those who *lead* and those o *follow*. And the simplest view to take of the words quoted to treat *begin*, *excite* and *cause* as different names for the same ng, to wit the offence of the officer or soldier who originates is instrumental in originating a mutiny, and *join in* as referg especially to the offence of one who participates in a mutiny en once inaugurated.

trictly, however—though the terms are not necessarily so sely construed—the *beginning* of a mutiny would embrace y cases in which the offender himself personally takes the

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"It is by no means necessary that there should be any previous berate combination for mutual aid and encouragement, or any preerted plan of operations to effect the illegal object." U. S. *v.* Morri- 1 Sumner, 450. And see U. S. *v.* Kelly, *ante*.

"The grand feature generally to be found in the crime of mutiny." uel, 274.

Samuel, 249–50; Hough, 68.

Simmons § 170. And see Samuel, 250, note; Griffiths, 21; Bombay 28; O'Brien, 71; Benét, 206. O'Brien writes—"Any act which, if d against the military authorities, would be mutiny, constitutes, if cted against the civil authorities, the crime of sedition."

The instances of so-called "sedition" and "seditious combination" . O. 6 of 1863 and 47 of 1864, were clearly not seditious but leaded cases of mutinous or disorderly conduct

Page 258.

initiative in the overt act or proceeding of opposition or resistance;[1] while the *exciting* or *causing* of a mutiny would include instances in which the offender takes no personal part in the riotous demonstration but confines himself to the stimulating of others to the resistance, &c., actually resorted to. Thus a mutiny may be excited and caused by an inflammatory harangue addressed to soldiers by one having influence or authority over them, as—especially—by an officer or non-commissioned officer; by his using, in their presence, defiant language, or behaving otherwise defiantly, toward a common superior; by his openly setting at naught the orders of the commander or issuing orders counter to his; by his falsely representing to his inferiors that they are being or about to be oppressed by a superior, &c.[2]

Joining in a mutiny is the offence of one who takes part in a mutiny at any stage of its progress,[3] whether he engage in actively executing its purposes, or, being present, stimulates and encourages those who do.[4] The joining in a mutiny constitutes a *conspiracy* and the doctrines of the common law thus become applicable to the status—*viz.* that all the participators are principals and each is alike guilty of the offence; that the act or declaration of any one in pursuance of the common design is the

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1. "The act of beginning any mutiny is an overt act, and the direct employment of force against authority. * * * A party so acting becomes a ringleader." Hough, 70. And see O'Brien, 70.

2. See Hough, 71; also the case in G. O. 10, Dept. of the Mo., 1863, of a captain charged with "exciting mutiny" in causing the soldiers of a regiment to believe that their colonel had refused to furnish them with rations and otherwise injured them. O'Brien, (p. 298,) says—"It is enough to prove that the conduct of the prisoner was *one* of the exciting causes of the mutiny."

It is considered by Hough, (p. 70; and, to a similar effect, see O'Brien, 72,) that a superior who induces a mutiny in his own command by arbitrary treatment of his inferiors, or by failing to exercise proper discipline or other misconduct, is chargeable with the offence of exciting or causing a mutiny. It is deemed doubtful, however, whether such acts were contemplated by the Article.

3. "In its incipient state or when it shall be complete." Samuel, 258.

4. "It is not necessary that they should be proved individually to have used any force. * * * It is sufficient if they joined in the general confederacy, and by their presence countenanced the acts of violence committed. U. S. *v.* Sharp, Peters, C. 126. "Those who take part, whether by words or by deeds, by direct acts of aid or assistance, or encouragement or incitement, are, in contemplation of law, guilty of the offence." U. S. *v.* Morrison, 1 Sumner, 449.

ɔr declaration of every other; and that, the common design g established, all things done to promote it are admissible in ence against each individual concerned.[1]

one of the offences complete unless a mutiny actually ers. The Article, in designating as offences the beginning, and joining in, a mutiny, evidently contemplates that a iny shall have been consummated.[2] A mutiny complete in must actually have existed to authorize the bringing to trial ɑ accused for an offence of this class. Thus an *attempt* to te a mutiny, which has proved abortive, is not chargeable ɜr this Article,[3] but must be laid under the 62d.

rocedure under the Article—*The charge.* While the ge may be—"Beginning a mutiny," "Exciting a mutiny," ining in a mutiny," &c., or simply "Mutiny," the most factory form in general, as covering all the different phases fence, will be—"Violation of the 22d Article of war;" the ification setting forth the facts relied upon as constituting offence, with an allegation of the proper intent. Where, as ;ual, the mutiny is a concerted act, the charge is frequently *t;* all or the principal of the offenders being accused together tried together accordingly.[4]

he evidence. It need only be added here that, as a founda- for establishing the criminality of the accused in any case, fact that a mutiny actually took place should *first* be shown.[5]

he finding. Where only mutinous or disorderly conduct, ɪout the necessary intent, is made out by the testimony, or ɜre it appears that the accused attempted or endeavored to iate or induce a mutiny without succeeding, a finding of not ty of the offence charged, but guilty of "conduct to the preju-

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See Hough, 71; Simmons § 821; Pipon & Col., 146; O'Brien, 298; De Hart, 349; U. S. *v.* Sharp, *ante.*

O'Brien, 71; G. C. M. O. 73, Dept. of the Mo., 1873.

See G. O. 36, 38, of 1864.

See G. C. M. O. 104, Dept. of Ky., 1865; G. O. 20, D. & A. of the ı., 1864; G. C. M. O. 521, War Dept., of 1865—for cases, respect-, of fifteen, twenty-one, and thirty-four enlisted men, jointly charged tried as mutineers.

3 Greenl. Ev. § 92.

dice of good order and military dis
sorted to.

The sentence. This will ordi
of war than in peace: in the late w
peatedly adjudged upon conviction.
discretionary, the court will natu
severer penalty to ringleaders, espe
to those who are merely their follow
two or more grades are associated
properly punish superiors more h
facts, exhibited in evidence, as tha
aggravated by a tyrannical or opp
violence or severity, by an unwarra
neglect to redress a wrong, or by dr
on the part of the commander, or

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1. See cases in G. O. 104, 243, of 18
O. 227 of 1864; Do. 318, 513, of 1865;
Do. 40 of 1873; Do. 1, Div. of the Sout
Ky., 1865; Do. 4, Id., 1866; G. O. 87,
20, Dept. & Army of the Tenn., 1864;
In several of these cases the mutiny wa
officer or non-commissioned officer.

Earlier cases are those in G. O. of I
the former the court, in sentencing the
that his body be offered to the surgeon
the still earlier case (1814) of the Tenn
to, a sergeant and five privates were s
tences were approved by Gen. Jackson
ninety-seven received lesser punishme
were sentenced to be dismissed, and
to hold a commission in the army.
fence of these men as a capital crime w
at the end of three months, under the
retained only for that period, instead
they were held to be bound by the mili
Papers, Military Affairs, vol. III, pp. 69
in the Pennsylvania line, (*ante*,) two se
formally pardoned by Congress; they n
cipals" in the mutiny, "and no lives hav
of property committed." 4 Jour. Cong

In the recent case, in G. C. M. O. 12
scouts against the command of Col. E.
captain and six soldiers were killed, th
and a corporal—were sentenced to be

2. In connection with cases already
tenced to be dismissed, in G. O. 14, A.

iscipline in the command—will properly be taken into consider-
ion as going to extenuate the offence and reduce the measure
punishment.[1]

TWENTY-THIRD ARTICLE.

1. Suppression of Mutiny. This Article is naturally con-
lered under the two heads of the Suppression of existing mutiny
d the Giving information of intended mutiny.[2] As to *suppres-*
m—the Article, as is observed by Samuel,[3] makes it a crime to
nply "stand by" while a mutiny is being committed. "It is,"
adds, "declared the positive and bidden duty of every officer
soldier, under the pain, in case of neglect, of the severest pos-
ole punishment, to aid, to the utmost of his ability, in quelling
is dangerous and contagious crime." O'Brien, as apposite to
e injunction that the party shall use "his utmost endeavor,"
c., holds that "every officer is armed" by the Article "with
ctatorial and unlimited powers," and that "if his measures are
ronger than necessary he cannot be punished; the law justifies
im."[4] But this, as a general proposition, cannot be accepted.
While, in extreme cases, an officer is warranted in employing
e most rigorous means—in using a deadly weapon and taking
fe[5]—for the suppression of a mutiny, he will not ordinarily thus

1. See G. O. 12 of 1855; Do. 104 of 1863; G. C. M. O. 50 of 1867; so Samuel, 266; Harcourt, 17; DIGEST, 12, 13. So, while it is no *de-nce*, it may be considered, in mitigation of sentence, that the accused as not regularly enlisted (G. O. 32, Dept. of N. E. Va., 1861;) or that e recruiting officer made misrepresentations to him upon enlistment, Do. 71, Dept. of N. Mex., 1862;) or that he had been paid less than e stipulated amount of monthly pay. (Do. 29, Dept. of the South, 64.) While, as remarked by Gen. Canby, "nothing can *justify* the tempt to redress any real or fancied wrongs by the commission of one the gravest military crimes," (G. O. 71, N. Mex., above cited,) justice the accused requires that if wrongs really existed, his punishment ould be reduced in proportion. Compare, herewith, the case of the Mutiny at the Nore," (1797,) originally incited by the fact that the men of the navy had suffered from low pay, insufficient provisions, c., and that their petitions for relief had not been duly considered.

2. It is to be understood that what is said under this Article as to utiny applies substantially to "sedition"—a crime already defined der Art. 22.

3. Pages 258–9. And see Tytler, 187; Harcourt, 14.

4. Pages 73, 77.

5. Compare the naval case of the mutinous conspiracy on the U. S.

be warranted in a case of mutiny unaccompanied by violence or where less vehement methods will be entirely effectual.[1] The measures adopted, and especially the amount of force employed, should properly depend upon the circumstances of the case, and particularly upon the existing status, whether of war or peace. Means which, in war and before the enemy, would be not only justified but laudable, might, in peace, be without warrant and criminal, and commanding officers, in employing them, might become liable, for abuse of authority, not only to trial by court-martial but to indictment in a civil tribunal.

The term "utmost endeavor," as employed in the Article, is to be construed as having a relative bearing, the word "utmost"

Brig "Somers," in 1842, when three persons—Midshipman Spencer, (son of the then Secretary of War,) and a warrant officer and a seaman—were hung by order of Commander Mackenzie, after an investigation and recommendation by a council of officers. For this summary action Com. Mackenzie was brought to trial, in 1843, upon charges of abuse of authority and murder, and acquitted. 1 N. York Legal Observer, 371; Printed Trial, with Review by Jas. Fenimore Cooper. As to the authority of the master, in cases of mutiny, at maritime law, see Roberts *v.* Eldridge, 1 Sprague, 54.

1. DIGEST, 314. And see G. O. 53 of 1842, in regard to the treatment of private soldiers by their superiors, where it is enjoined by Gen. Scott that in a case of mutiny the proper course, if practicable to pursue it, is not to cut down even the ringleaders, but to seize and confine them. Also G. O. 32, Dept. of N. E. Va., 1861, in which it is declared that sixty-two mutineers—enlisted men of the same regiment—"are, with the approval of the General-in-Chief, hereby transferred in arrest from their regiment, as no longer worthy to serve with it, and will be sent to the Dry Tortugas, there to perform such fatigue-service as the officer commanding may assign them, until they shall, by their future conduct, show themselves worthy to bear arms." [Gen. McDowell.] Upon the subject of summary proceedings, involving the taking of life, in the suppression of mutiny, Samuel, (p. 268,) writes:—"When they are resorted to, it is requisite in every case, in order to justify the departure from legal forms, that it be clearly made out that the mutiny was flagrant, and that it called for strong and instant measures to put it down; and that the means used were not more violent than needful, and that it was not safe to wait for the trial and execution of the offenders by the ordinary course of military justice." In the case of the mutiny of the New Jersey Brigade, in January, 1781, where Washington, in his orders to Maj. Gen. Howe, directed: "If you succeed in compelling the revolted troops to a surrender, you will instantly execute a few of the most active and most incendiary leaders,"—two of the ring leaders were in fact executed, but not till after a "field court-martial" had been held, and they had "received sentence of death by the unanimous decree of the court." Sparks' Writings of Washington, vol. V pp. 381, 382, 386, 564.

ıs meaning the utmost that may properly be called for by the cumstances of the situation, and in view of the rank, com- .nd and abilities of the individual.[1]

't is also to be observed that the authority, as well as the duty, 'olved by the Article, *ends with the suppression.* The mutiny 'ing been effectually put down, no punishment can legally be icted upon the offenders except through the regular course of :ice and the sentence of a court-martial.[2]

Reform and Redress. It may here incidentally be remarked t in connection with the suppression of a mutiny, it will be no re than just for the commander to remove as far as may be cticable the causes which led to the outbreak. Thus, where ıas been occasioned either by defective discipline, oppressive ıtment, the deprivation of a right, or the existence of any .er real grievance, the commander, after first effectually sup- ssing the mutiny according to the injunction of the Article, y and properly should proceed to put an end to the abuse or to lress the wrong, either by his own orders or by making the ɔessary official representations to superior authority.[3] In this ation the fact may well be recalled that a large proportion of extended mutinies that have occurred among bodies of troops re had some color of reason in their inception, and might gen- lly have been obviated had the proper authorities but appreci- d the duty devolving upon military superiors of protecting sol- rs in the enjoyment of their rights and privileges, of seeing t a hearing was given them and justice done them when ag- ved, and of duly considering their feelings when natural and onable.[4]

See O'Brien, 78; G. O. 4 of 1843.

See Samuel, 260, 261, 267; Hough, 80, 81; Harcourt, 15; O'Brien, 78.

"Having punished guilt and supported authority, it now becomes er to do justice." Gen. Washington, referring to the mutiny in the Jersey line. Sparks' Writings of Washington, vol. VII, p. 136.

Hough, (P.) 36–53, details a series of mutinies which occurred ly in India, and arose in great part from neglect to make regular ents, insufficiency of rations, variations from the terms of the contract vice, and even disregard of the religious principles and customs e native troops. The most marked was the general mutiny and re- on of 1857, when, to cite from Chambers, (Encyclopædia—"India,")

2. Giving Information. The Article further requi officers or soldiers "having knowledge of any intended m &c., shall, "without delay, give information thereof" "commanding officer;"—thus, in the words of Samu prevent an impending mutiny by crushing it in the bu fore it burst forth in its bitter and unwholesome fruit."

While the *suppression* of mutiny will in most cases be bent more especially upon officers, the duty of *giving inf* of the same will perhaps oftener devolve in the first instan inferiors in rank. Thus Hough[2] observes that an intended "is more likely to be known to the non-commissioned of the regiment than to any other persons in it from their l the same barracks with the men."

In view of the imperative injunction to act without d officer or soldier cannot be permitted to exercise his ow ment as to whether he will or not impart the intelligen templated.[3]

Proof. To sustain a charge of a violation of the Articl consideration, the following particulars should be aver proved, *viz.*—the existence of an actual mutiny, or of an in to commit mutiny; the presence of the accused at the n or the fact of his having come to the knowledge that one tended; the neglect or failure to use the proper efforts press, or the neglect or failure to give the information, (or it without unreasonable delay,) to the commander.

It may be noted that officers or non-commissioned office "join in" a mutiny, in violation of Art. 22, will in gene also chargeable with the offence of not endeavoring to su a mutiny, in violation of Art. 23.

"the Enfield rifle and its greased cartridge were put into the ha the Sepoys without explanation and precaution, and Genl. Ans commander-in-chief, snubbed caste, and was against all concess the 'beastly prejudices' of the natives."

1. Page 259. And see Tytler, 187.

2. Page 81. And see cases of non-commissioned officers con of a violation of this Article, in not giving such information, &c.,– O. 16, Dept. of Ala., 1866; G. C. M. O. 81, 142, 147, Dept. of the 1868.

3. See Hough, (P.) 77.

TWENTY-FOURTH ARTICLE.

ts General Effect. This Article, (which dates from the ish codes of 1642 and 1688,[1]) practically adopts the doctrine he common law in regard to the suppression of affrays, ex- ls it to cases of "quarrels" and "disorders," and applies it, er certain conditions, to the military state. Placed as the icle is in immediate connection with the provisions relating nutiny and duelling, it may well be inferred that one of its n purposes was, by the summary proceeding which it au- izes, to put a stop to those contentions and irregularities, ch, if not suppressed at the outset, might readily lead to these nidable crimes.

he Common Law as to Affrays. At common law, a ay" or "affray" is a fighting or hostile contention of two or e parties in public, to the terror of the citizens. Derived n the French *effrayer*, to frighten, the element of being fear- sing, and so threatening to the peace and security of law- ling persons, is the gist of the definition. It is distinguished n an assault or assault and battery in that, besides being neces- ly public, it is a mutual contention on the part of the actors, not a mere violence or attempted violence committed against ther, *in invitum*. Mere words or personal abuse cannot alone ount to this offence; to constitute an affray the words must be ompanied by acts. At the same time it is held not absolutely essary to the offence that actual violence, as by wounding, ws, or other battery, should be inflicted upon the person, pro- ed dangerous weapons are exhibited and sought or threatened be used by one or more of the parties against the other or ers.[2] All persons present engaged in aiding and abetting an ay are principals.[3]

An affray being a disturbance of the public peace, and it being

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See under "Twenty-Fifth Article"—*post*.

On the definition and nature of affray, see Coke, 3 Inst., 158; 1 vkins, c. 63, s. 1, 4; 4 Black. Com., 145; 1 Russell, 291; 2 Wharton, L. § 1551; 2 Bishop, C. L. § 1; Simpson *v.* State, 5 Yerg. 356; e *v.* Heflin, 8 Humph. 84; Duncan *v.* Com., 6 Dana, 295; Com. *v.* mons, 6 J. J. M., 615; Hawkins *v.* State, 13 Ga. 322; O'Neill *v.* e, 16 Ala. 65; Childs *v.* State, 15 Ark. 205; Samuel, 399; Hough, 202.

Carlin *v.* State, 4 Yerg. 143.

the right as well as the duty of the citizen to quell or aid in quelling all breaches of the peace, the authority of private individuals to part and restrain persons engaged in an affray is fully recognized at law.[1]

Application of the Principle in the Military Service. An officer of the army is still a citizen and has the same summary power as any citizen forcibly to repress frays[2]—a power which it is especially his right and duty to exercise in cases occurring in the army. Recognizing this, the Article, in its zeal for the order and discipline of the service, extends the power to the suppression of "quarrels" and "disorders."[3] By these designations, which are more general and colloquial in their use than the more technical term "frays," are evidently intended any unruly contentions or disturbances in public among or by officers or soldiers, whether or not accompanied by violence employed or threatened.[4] They may thus consist of mere wars of words, provided they are such as, if not presently quieted, would be likely to lead to blows or other overt acts of force.

By whom the Power may be Exercised. Construing the words—"*All officers of what condition soever*" with the words in the last clause—"*such officer or non-commissioned officer*," it is clear that not only commissioned officers but sergeants and corporals are vested with the power to part, quell and arrest,

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1. 1 Hawkins, c. 63, s. 11; 4 Black. Com., 145; 1 Bishop, C. P. § 166; Timothy *v.* Sampson, 1 C., M. & R. 762; Price *v.* Seeley, 10 Cl. & Fin. 28; Phillips *v.* Trull, 11 Johns. 387.

2. See Simmons § 1096–1100; Harcourt, 178; Pipon & Col., 190; Bowyer, Com. on Eng. Const., 499; Burdett *v.* Abbott, 4 Taunt. 449; G. O. 52, Dept. of the South, 1871.

3. As to the duty of an officer to use due diligence to prevent riot and disorder in his command, see remarks of Gen. Schofield in G. O. 104, Dept. of the Mo., 1863. In G. O. 63, Dept. of the Tenn., 1863, Gen. Hurlbut, in remarking that by Art. 24 officers are not only empowered but "required" to quell affrays, adds that the accused officer, in the case under review, was enabled to take the life of his commander, through the neglect of those who should have acted to interpose and put a stop to the contention. In G. O. 92, Dept. of the South, 1872, Gen. Terry properly holds that "an officer *under arrest* is not deprived of the authority conferred by this Article to quell frays or disorders."

4. See Samuel, 400; O'Brien, 107. A *riot*, or tumultuous assemblage of persons who engage in acts of violence, will, if taken part in by officers or soldiers, be an aggravated "*disorder*" within the meaning of the Article.

without regard to the superiority in rank of the persons whom they may thus regulate and restrain.[1] An inferior, however, would not properly assume to exercise the authority to arrest a superior in the presence of a senior officer, unless indeed the latter was either himself concerned in the offence or conspicuously recreant in his duty on the occasion, or was incapacitated to act—as by drunkenness.

It is further clear from the terms of the Article that the power conferred is one not attached to *command* but quite independent of it, since it may be exercised without regard to the regiment, company, &c., to which the persons offending may belong.

Mode of Exercise of the Power. To part affrayers and quell a fray or disorder, the officer may employ such means as may be requisite, resorting even to the use of a deadly weapon if other means fail or are inadequate. The action of an officer in repressing a disturbance which, if not at once subdued, may result in a mutiny or riot, should not be too strictly criticized; at the same time he is in no case authorized to use more force than may be reasonable under the circumstances, or to resort to blows or other violence where the object may be attained by summoning a guard and causing the arrest or confinement of at least the leaders of the outbreak.[2] Where such arrest, &c., has been ordered by an inferior officer or a non-commissioned officer, it will be, further, his duty, according to the terms of the Article, to report forthwith his action to the commanding officer of the person or persons arrested.

Proof—Defence. In proving either of the two specific offences, it should properly be made to appear that the accused

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1. Samuel, 400; Hough, 203; Simmons § 357; Griffiths, 25; O'Brien, 107. The leading English case under this Article is that of Lieut. Col. Hog, who was placed in arrest by a Captain of his regiment for disorderly conduct on duty resulting from drunkenness. James, 839; Simmons § 357; Hough, (P.) 123.

It may be noted that the *power* implies a *duty*. Thus Tytler, (p. 196,) observes that an officer who stands by and witnesses an affray or disorder without exerting the authority conveyed by the Article, "must be considered as aiding and abetting the principal offenders."

2. "The force to be employed in quelling an affray or maintaining the peace is that only which is necessary to secure and subdue the offenders. It * * * must be such force as is preventive in its character, and must not exceed the strict necessity of the case requiring such acts of prevention." G. O. 4 of 1843. [J. C. Spencer, Sec. War.]

heard and understood the order, and knew that the person giving it was a commissioned, (or a non-commissioned,) officer of the army. A defence, interposed by the accused, that he had no such understanding or knowledge will receive support from the fact, if such be the case, that the officer was not in uniform, and belonged to another regiment, &c., of the command. As indicated by Hough,[1] it is no sufficient defence that the accused finally did comply with the order given, provided he first refused to obey it or resisted the officer.

Punishment. The fact, however, of the ultimate compliance with the order will, if voluntary, properly be admissible in evidence as going to the measure of the punishment, this being left discretionary with the court. So will any other fact tending to extenuate the culpability of the accused,—as that, in defying or resisting the order, he was only acting in combination with or at the instigation of his superiors in rank.

XII. THE TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-SEVENTH, AND TWENTY-EIGHTH ARTICLES.

[CHALLENGES TO DUELS, &c.]

"ART. 25. *No officer or soldier shall use any reproachful or provoking speeches or gestures to another. Any officer who so offends shall be put in arrest. Any soldier who so offends shall be confined, and required to ask pardon of the party offended, in the presence of his commanding officer.*

"ART. 26. *No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct.*

"ART. 27. *Any officer or non-commissioned officer, commanding a guard, who, knowingly and willingly, suffers any person to go forth to fight a duel, shall be punished as a challenger; and all seconds or promoters of duels, and carriers of challenges to fight duels, shall be deemed principals, and punished accordingly. It shall be the duty of any officer commanding an army, regiment,*

1. Page 204.

op, battery, company, post, or detachment, who knows or has ason to believe that a challenge has been given or accepted by any icer or enlisted man under his command, immediately to arrest e offender and bring him to trial.

"ART. 28. *Any officer or soldier who upbraids another officer or dier for refusing a challenge shall himself be punished as a chal-ger; and all officers and soldiers are hereby discharged from y disgrace or opinion of disadvantage which might arise from eir having refused to accept challenges, as they will only have ted in obedience to the law, and have done their duty as good sol-ers, who subject themselves to discipline.*

TWENTY-FIFTH ARTICLE.

Origin. The proper original of this Article, as also of Arts. , 26, 27 and 28, is the comprehensive and important Art. 34 of e Code of James II, of which some of the provisions were early derived from Art. 84 of Gustavus Adolphus, through in-rmediate Articles of 1639 and 1642.

Its Purpose and Effect. The 11th Article of the code of '75, in prohibiting the sending of challenges and fighting of uels, is prefaced with the brief injunction that—"*no officer or ldier shall use any reproachful or provoking speeches or gest-res to another.*" The succeeding code of 1776 formed this in-nction into a separate Article substantially as it has since re-ained. Its main object, as indicated by its origin, evidently is check such manifestations of a hostile temper as, by inducing taliation, might lead to duels or other disorders. The Article es not contemplate a judicial investigation, but is a rule of dis-pline confined to measures of prevention and restraint.[1] In actice, however, the provision enjoining the *asking of pardon* soldiers is rarely, if ever, resorted to;[2] the course pursued th regard either to officers or soldiers, who may be culpable indicated in the first clause, being to place them in arrest d prefer charges with a view to trial—as in any other case of ence.

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1. See, as to the legal significance of this Article, Samuel, 351–2, 2–6; Hough, 175–7; O'Brien, 100; DIGEST, 13.

2. Samuel, (p. 373,) refers to it as "an inoperative letter."

If indeed the proceeding specified in the Article is pursued, and the offender, having been afforded a *locus pœnitentiæ* by being placed in arrest, presently tenders an apology or makes other suitable amends, and is thereupon released, without further action, by the commanding officer, he cannot in general properly be brought to trial at a subsequent period. Samuel[1] cites the case of Capt. Burdett, in which the accused was acquitted because it "appeared in the course of the evidence" that his offence had been previously thus atoned for under the corresponding British article.

TWENTY-SIXTH ARTICLE.

Purpose of Arts. 26–28. This Article and the two following aim at preventing duelling in the army, by rendering liable to immediate arrest, trial and severe punishment, all military persons without distinction, who send or accept challenges, act as seconds, knowingly carry challenges or acceptances, or otherwise promote duels, as well as commanders of guards who neglect to stop parties going out to fight duels, and even persons who upbraid others with refusing to accept challenges.[2]

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1. Page 376.

2. It is noticeable that the specific offence of *fighting a duel* is not in terms mentioned in our code, and could in general therefore only be charged as a disorder or breach of discipline under the 62d Article.

But this offence, and those specifically made punishable in Arts. 26–28, are now of rare occurrence, though once by no means unfrequent. The author of the "Military Law of England," published in 1810, in referring to the practice of duelling in the British army, writes:—"There are cases in which, notwithstanding the explicit declarations of the written law, the custom of the service would seem to demand a reference to arms." So lately also as in 1828, McNaghten, while condemning duelling on principle, adds, (p. 237,) that he "must pronounce it an indispensable custom, things being constituted as they are at present." And he refers to "three of the first officers" then in the army—"the Duke of York, the Marquis of Hastings and the Marquis of Londonderry"—as having "been concerned as principals or seconds in duels and allowed to go unscathed." In the next year the Duke of Wellington added himself to this list by his duel with the Earl of Winchelsea. In James' Precedents there are reported nearly fifty cases of officers tried for engaging in duels, sending challenges, or otherwise promoting such proceedings. The instances in our service have been much fewer, those published in the following General Orders comprising nearly all that have taken place, *viz.*:—G. O. of May 22, 1814; Do. of Sept. 1817; Do. 39, 41 of 1835; Do. 2 of 1858; Do. 330 of 1863; Do. 11. Army of the Potomac, 1861; Do. 46, Dept. of the Gulf, 1863; Do. 223, Dep.

he Common Law on the Subject of Duels and Chal-ges. The practice of duelling, "grounded," as Lord Bacon resses it,[1] "upon a false conceit of honor," or, as described Tytler,[2] "upon mistaken sentiments of honor, and supported alse shame," is, with the incidental offences of sending a chal-ge, acting as second, &c., denounced as criminal, alike by the mon law and by statute.[3] By the common law, the taking of in a duel is murder in the killer,[4] whatever may have been the sion or provocation of the fight and notwithstanding the ab-e of actual homicidal intent.[5] So is it also murder in the sec-s of both parties[6] and others who are present abetting the act;[7]

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e Mo., 1864; Do. 48, Id., 1870; Do. 130, Id., 1872; Do. 33, Dept. Army of the Tenn., 1864; Do. 13, Northern Dept., 1865. In a more nt case, in G. C. M. O. 22 of 1879, of an alleged challenging, the sed was acquitted. See, further, case of three Lieutenants, con-ed of sending, carrying and accepting a challenge, in G. O. 139, A. G. O., Richmond, 1863.

2 Howell, S. T., 1037.

Page 192.

See 2 Wharton, C. L. § 1767, 1768, as to the origin of duelling and growth of the law on the subject.

"Wherever two persons in cool blood meet and fight on a pre-ent quarrel and one of them is killed, the other is guilty of murder." lawkins, c. 31, s. 21. "Deliberate duelling, if death ensueth, is, in the of the law, murder." Foster, 297. And see 1 Hale, 452; 4 Black. Com. ; Taverner's Case, 3 Bulst. 171; Regina *v.* Young, 8 C. & P. 644; arton, C. L. § 482, 1768; 2 Bishop, C. L. § 311; State *v.* Underwood, Mo. 40.

It is no defence that the party killed was the challenger, or the ag-sor; or that the party indicted "meant not to kill but only to disarm adversary." 1 Hawkins, c. 31, s. 21; 1 Hale, 443; 1 Russell, 527; Tav-r's Case, *ante;* King *v.* Rice, 3 East, 581; Com. *v.* Hooper, Thach.

"The seconds also are equally guilty." Regina *v.* Young, *ante.* l see 1 Hawkins, c. 31, s. 31; 1 Russell, 529; Wharton, C. L. § 1768; ishop, C. L. § 311; Regina *v.* Cuddy, 1 C. & K. 210; Do. *v.* Barronet, rs. 51. In the last case it was held to be no defence that the duel a "fair" one. The criminal liability of the second of the deceased o less than that of the second of the other party. Regina *v.* Young; *v.* Cuddy.

"With respect to others" (than the seconds,) "shown to be pres-the question is, did they give their aid and assistance by their ntenance and encouragement of the principals in the contest. Mere ence will not be sufficient, but if they sustain the principals either advice or assistance, or go to the ground for the purpose of encour-g and forwarding the unlawful conflict, although they do not say or nything, yet if they are present, assisting and encouraging by their

all such persons being treated as principals equally with t who fires the fatal shot.[1]

At common law also the mere challenging of a person t a duel, though none be fought, is held to be a high misdem as an act tending to a serious breach of the peace.[2] So c of challenges, (knowingly such,) and other promoters of as well as provokers of the same, are held indictable for meanor at common law.[3]

Civil Statute Law. In this country, the offences of l in a duel, of fighting duels, of sending, conveying and acc challenges, and of seconding, promoting, or prompting chall are denounced by special statute in a considerable proport the States, and "specific and graduated punishments" as to the guilty parties.[4]

Military offenders will thus in general be amenable t military charges and to criminal indictment.[5]

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presence at the moment when the fatal shot is fired, they are in la of the crime of murder." Regina *v.* Young. "This extends eve surgeon." 2 Bishop, C. L. § 311.

1. Wharton, C. L. § 1768; 2 Bishop, C. L. § 311; Hough, 19 *v.* State, 1 Yerg. 232. And see Regina *v.* Cuddy, *ante;* also cas sign McGuire and three other officers convicted of murder fo part in a fatal duel. James, 545; Hough, (P.) 260.

2. See case, (in James, p. 47,) of Major Armstrong, indicted f lenging Maj. Gen. Sir Eyre Coote.

3. 1 Hawkins, c. 63, s. 3; 4 Black. Com., 150; 1 Russel, 297 ton, C. L. § 1768, 1773; 2 Bishop, C. L. § 312.

4. Wharton, C. L. § 1769. The laws of Ohio contain an e clear and comprehensive statute on the subject of this class of c (1 R. S., 412.) The statute for the District of Columbia, (R. S of Col., Secs. 1164, 1165,) by which the crime of killing in a made punishable only by imprisonment in a penitentiary for a t exceeding ten years, is but an illustration of the inadequate code of that locality.

In Massachusetts, a *surgeon* present at the fighting of a due pressly made punishable by fine and imprisonment, and disqual for office under the State for five years. (Gen. Stats., c. 160 § 1 in New York, (3 R. S., 962,) surgeons present at duels are pu by imprisonment in the State Prison.

5. See Samuel, 403; also King *v.* Rice, 3 East, 581, and oth (mentioned in 2 McArthur, 176, 181; Kennedy, 267; James, 47, Simmons § 835, note,) of military and naval officers subjected before criminal courts, for taking part in duels as principals or

ffences made Punishable by Art. 26. This Article makes ishable the two specific offences of Sending a challenge and epting a challenge.

ending a Challenge—*What constitutes a challenge.* arton[1] defines a *duel* to be—"a concerted fight between two ons, with deadly weapons, the object of which is claimed to he satisfaction of wounded honor." Its elements thus are, it must be premeditated and deliberate, as distinguished from dden rencontre in warm blood;[2] must contemplate the emment of weapons from the use of which homicide may be ected as a natural and probable consequence;[3] and must be reed to, ostensibly at least, with a view to obtaining amends for e affront which has or is conceived to have injuriously affected character or offended the sensibility of the person concerned man of honor.[4] A *challenge* is a written or verbal[5] demand, iest, or invitation to another to unite in such a combat.[6] o particular form of words is necessary to constitute a chalge in law.[7] The *intention* of the language employed is the terial point. Mere bullying or defiant language does not ount to a challenge;[8] nor do words conveying only a willings to fight or a readiness to accept a challenge from the other ty.[9] The communication, taking the whole together, must port an intention to invite to a duel the person to whom it is lressed; if it does so, it is a challenge, whatever be the expres-is used. The invitation indeed need not be tendered in direct

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. Wharton, C. L. § 1767.

. Id., § 1770.

. See Id., § 1771; Com. *v.* Hooper, Thach. 405.

. See Wharton, C. L. § 1772.

Coke, 3 Inst. 158; 1 Hawkins, c. 63, s. 3; 4 Black. Com. 150; 2 iop, C. L. § 314; Samuel, 384; Hough, 183. In State *v.* Strickland, . & McC. 181, the court observes that a challenge *may* be given in pen, public manner, but that this is "very unusual indeed."

"The offence consists in the invitation to fight." State *v.* Taylor,). Ca. 108. And see 2 Bishop, C. L. § 314.

Wharton, C. L. § 1771, 1777; 2 Bishop, C. L. § 314; Samuel, ; O'Brien, 104; G. O. 2 of 1858.

Com. *v.* Hart, 6 J. J. Marsh. 119; Ivey *v.* State, 12 Ala. 277.

See Com. *v.* Tibbs, 1 Dana, 524; Aulger *v.* People, 34 Ills. 486. his character are such expressions as—"I am responsible for my ls;" "You know where to find me," &c.

and express terms; it is sufficient if it be conveyed indirectly by implication.[1] Written challenges are indeed often phras language designed to be ambiguous, and to disguise the mea of the writer so that he may be enabled to evade the crim liability attaching to his act.[2] In such cases the constru given to the supposed challenge by the party to whom it i dressed, and the response made or action taken by him upo ceiving it, are especially significant as interpreting the true m ing of the communication.[3] But the stilted and affected ver in which challenges are usually expressed is quite familiar t courts and the public, and their true object is generally en transparent.[4] Where, however, ambiguously or obscurely wo or containing technical terms, they may be explained by a ence to the so-called duelling code,[5] or by the circumstanc

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1. It is not necessary that the writing should expressly state meeting is requested with a view to fight, or describe the weapon posed to be employed. Com. *v.* Hart, *ante.* Nor need it refer origin of the difficulty between the parties, or the matter of the sup grievance of the challenger. Hough, 183. Nor need it indica place where the duel is proposed to be fought. 2 Bishop, C. P. §

The most common form of challenge commences with a refere some ground of difference or complaint, demands satisfaction there the party addressed, and refers him to a "friend," (often the bea the challenge,) who is declared to be authorized to arrange the preliminaries. See the forms in the following cases:—State *v.* Cur ham, 2 Speers, 249; Com. *v.* Rowan, 3 Dana, 395; Com. *v.* Pope 418; State *v.* Gibbons, 1 South, 41; State *v.* Dupont, 2 McC. 334; *v.* Levy, 2 Wheeler, C. C. 245; G. O. 330 of 1863. In G. O. 11, Ar the Potomac, 1861, the invitation is expressed in the form of a *dar* fight. In G. O. 33, Dept. & Army of the Tenn., 1864, the dema satisfaction, which is, in terms, "to fight a duel," is accompanie a threat to "brand" the party if he does not accept.

2. Samuel, 384, 386. "As challenges are in violation of law, nuity is not uncommonly exercised to avoid a plain expression of purpose. But these are artifices to defeat the law which courts will never favor." G. O. 2 of 1858. (Col. Sumner's case.)

3. See Com. *v.* Hart; Com. *v.* Pope, *ante;* Hough, 183, and "When the meaning is so clear as to be intelligible to the party receives the challenge, it answers its purpose, and is intelligible tribunal which tries it." G. O. 2 of 1858.

4. In Com. *v.* Levy, 2 Wheeler, C. C., 245, where the challeng formed the party addressed that he 'considered himself insulte expected the satisfaction of a gentleman,' the Court observe: what does this mean? Everybody knows that it means—'I cha you to fight a duel with me with deadly weapons.'"

5. State *v.* Gibbon, 1 South, 51.

: controversy and the acts, conversation, correspondence, &c., the parties, as exhibited in evidence.[1]

The sending. The early British Article from which ours was ived characterized the offence as the *giving or sending* of a allenge. The American Article, however, has, from the begin-g, employed only the word send, and the present form declares at "*no officer or soldier shall send a challenge*," &c., and further kes punishable the accepting of a challenge "*so sent.*" It is sidered therefore safer to hold that the *giving* of a challenge, ectly and in person, by the challenger himself, (which must an act of rare occurrence,) is not an offence included within s Article but one which would properly be charged under t. 62.

The Article forbids the sending of a challenge "*to another cer or soldier*," and it is clear that the offence is equally com-te whether the challenge be addressed to a superior or an in-or in rank: it is also clear that the sending of a challenge to ivilian would not be within the Article.[2]

The sending may be shown by evidence of a sending by a senger, whether a *second* or other person, or by any other re-le and direct mode of transmission, as the mail. Actual de-ry or receipt of the challenge need not be established, the nce being complete without it.[3] But the sending, where a ipt is not proved, must be shown to have been such as would mably have resulted in a delivery. If the mail was resorted the prosecution should be prepared to prove that the commu-ation was put into the post office or other proper place of de-it for letters, correctly addressed, and the postage pre-paid if essary; for the law will then presume that it was duly for-ded to its destination.[4] It is not necessary to show that the llenge was either accepted or declined by the person to whom

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2 Bishop, C. P. § 309; Com. *v.* Hart; Com. *v.* Pope; Hough, 183; ien, 104. The admissions and material statements of seconds are competent both for and against their principals, for the purpose of ering more intelligible the intentions of the latter. Wharton, C. L. 78; 2 Bishop, C. P. § 308; State *v.* Dupont, 2 McC. 334; State *v.* or, 1 So. Ca., 108. See Chapter XVIII—"Res Gestæ."

O'Brien, 104.

Rex *v.* Williams, 2 Camp. 506; Wharton, C. L. § 1774; 2 Bishop, § 307.

Bank *v.* Hart, 3 Day, 491.

it was sent.[1] The non-acceptance of the challeng
exonerates the sender; to the completeness of
quite immaterial whether or not an offence be co
other party. It is equally immaterial to the que
bility of the accused whether or not a duel actua
the challenge.[2]

Proof of the sending of a written challenge is
pleted by the production of the writing, with ev
in the handwriting of the accused, or was penne
his dictation or request.[3] Where the writing cann
as where it is in the possession of the opposite
proof of its substance will be sufficient.[4]

Accepting a Challenge. This offence may
by proof of an acceptance either oral or written,
municated personally or dispatched by a messen
other reasonably certain agency—as the mail. W
ance is by written missive, the actual delivery o
not be shown. Whether a duel resulted is imm
a written acceptance is put in evidence, the sam
writing, &c., is to be made as in the instance of

No form of words is necessary to constitute an
only requisite to legal acceptance being that the l
an intent to accede to the invitation conveyed by
As in the case of a challenge, parol evidence ma
to explain obscure expressions in an alleged writt
and to determine whether it be an acceptance in

Defence — Punishment. The sending or
challenge being *prima facie* established, the only
the accused, where the facts are not denied, woul
that a criminal *intent* was wanting—as, for exampl
act was not proposed, but that the proceeding was
ter or joke.[6] No *provocation*, however great, ca

1. Samuel, 383; Hough, 183, note 7; O'Brien, 104.
2. Coke, 3 Inst., 158.
3. Com. *v.* Levy, Wheeler, C. C., 245; Hough, 184
4. See Com. *v.* Hooper, Thach. 400, 407.
5. See the form of the acceptance in Com. *v.* Rowan
6. See Com. *v.* Hart, 6 J. J. M., 119; Ivey *v.* Sta
Wharton, C. L. § 1771.

fence.[1] Circumstances, however, of provocation, may be adtted in evidence, as apposite, in a case of an enlisted man, to : question of the proper measure of punishment, and, in a case an officer, (where the sentence is mandatory,) as material to : action of the reviewing officer in approving, disapproving, tigating, &c., the penalty of dismissal.

TWENTY-SEVENTH ARTICLE.

The Classes of Offenders made Punishable. This Article, iforming to the common-law doctrine already noticed, makes iishable as *principals*, *i. e.* in the same manner as the challenger ose offence is the subject of the last Article, not only active :nts in the matter of challenges and duels, but some who are rely passive also—placing them all upon the same plane of pability.[2] The several classes indicated, and the nature of ir offences, will be considered in the following order:—1. Secds; 2. Carriers of challenges; 3. Promoters of duels; 4. Comnders of guards suffering persons to go out to fight duels.

Seconds. That which peculiarly characterizes the second is s acting in a *representative* capacity for his principal: if a party es not sustain this character, he may be a "promoter" but nnot properly be charged as a second. Moreover, to make him second, such capacity must be, not voluntary and gratuitous erely, but assumed at the instance or request of the principal with his acquiescence. It need not, however, be directly proved at the principal requested or procured the accused to assist him second:[3] the fact that he was named in the challenge as a Friend;" that he declared himself to be a second, or performed ts in that capacity which were accepted as such by the prinal; or that he was viewed and treated with as such, in the angements, by the parties and seconds generally,—such facts d circumstances would ordinarily afford a sufficient presumpn of his authority and representative capacity in the case.

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1. Hough, 184; Taverner's Case, 3 Bulst. 171. "The aggravating cirnstances under which the challenge was made are no excuse for the nce." G. O. 33, Dept. & Army of the Tenn., 1864.

2. Samuel, 387, 390. And see O'Brien, 105.

3. See Case of Lieut. Ivers, tried for requiring a non-commissioned cer to attend him as a second. James, 227.

This acting of the second must, to constitute the offence, l either *at* a duel, or with a view to the fighting of one. It is n considered absolutely essential that there should be an actu duel, or, if there be one, that the accused should be present at If, in his character of second, he actively participate in maki preparations for the duel, as by conveying the challenge or sponse, conducting the correspondence, arranging the prelin naries in connection with the second of the other party, providi the weapons, &c., he will bring himself within the description "seconds or promoters of duels," as employed in the Article.[1]

Proof. Here, as under the charge of sending a challeng the admissions and material statements of the principals, as w as of the other second or seconds, having reference to the subje of the duel, will be admissible in evidence against (or for) t accused, as illustrating the nature and intent of his acts.[2] T "duelling code" may also be put in proof, to indicate what ac and service pertain to the functions of a second.

Defence. The accused may show in defence that he consents to assume the rôle of second, for the purpose not of promoting but of preventing a duel by composing the strife or otherwise, and that he acted solely with this object. Or he may show that, having once consented to be second, he presently withdrew without having taken any part in preparing for a hostile meeting.

Carriers. By the designation—"carriers of challenges to fight duels,"[3] the Article no doubt mainly contemplates persons *other than seconds* who convey invitations to fight duels from one party to another, though seconds who perform this office are, of course, chargeable as carriers.

To constitute the offence of the carrier, the carrying must be performed *knowingly*, *i. e.* the accused must know that the mes-

1. Compare Com. *v.* Boott, Thach. 394.

2. Wharton, C. L. § 1778; 2 Bishop, C. P. § 308; Com. *v.* Boott, Thach., 392–3.

3. It is noticeable that *carriers of acceptances* are not specifically made punishable by this Article. One, however, carrying, knowingly, an acceptance of a challenge would be chargeable under this article as a promoter of a duel, or under Art. 62. In the criminal code of the District of Columbia, the carrying of an acceptance is made punishable in the same manner as the carrying of a challenge. (R. S., Dist. Col., Sec. 1164.)

is a challenge to fight a duel.[1] If the challenge is verbal, ın indeed scarcely but know its nature; it is therefore mostly .e case of written challenges that specific proof of knowledge ıuired to be produced. In proving knowledge, it is not neces- to show that the accused was informed of the character or :nts of the paper by the sender: he may learn of it from r persons; from having himself been present at the quarrel of parties, or been acquainted with the circumstances of their :ence or of their personal relations; from common report; 'en from the manner and tone of the sender provided these so significant that they could not reasonably be misunder- l.[2] It is only essential that the carrier should have the knowl- before the carriage be completed.

ıe offence is consummated by the *delivery* of the challenge. ıave seen that the offence of the *challenger* is completed upon utting the challenge in the way of being delivered, whether actually delivered or not. But the carrier, to become amen- to the Article, must actually deliver the challenge, for until ɔes so their is a *locus pœnitentiæ*, and, if he repents himself ıs assumed mission before it is fully performed, there is no age and he is not chargeable. It may be added that it is not lutely necessary that there should be a delivery to the party *rson:* if, in his absence, the challenge be delivered, for him, ɔme person through whom it is reasonable to suppose that it presently come into his hands, the carriage will be complete ıw.[3]

romoters of Duels. This is a general designation, includ- any person who, by stimulating the resentments of another, ıy appeals to his pride, shame, sense of "honor" so called, therwise, (and whether by direct and pointed means or by :rt insinuation,) purposely incites him to tender or to accept allenge,[4] or, in any way, other than by acting as a second,

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"Otherwise," observes Samuel, "he might be as little culpable as rdinary letter-carrier who cannot be presumed to understand the nts of the correspondence that passes, almost mechanically, through nds." And see Hough, 199, 200; O'Brien, 107; U. S. *v.* Shackel- 3 Cranch C., 178.

See Hough, 200.

See Hough, 184.

The term *promoters* "applies to parties who, whether concerned

or the carrier of a challenge, designedly furthers or contributes to the fighting of the duel. Promoters are thus distinguished from seconds and such carriers; for though these are in effect promoters of duels, (and might, without material error, be charged as such,[1]) they have at the same time a distinct and specific rôle, while that of the promoter proper is more general and not confined to any particular act or province. Carriers of *acceptances* are clearly promoters and so chargeable.[2]

As it is not necessary, to complete the offence of the *second* or the *carrier*, that a duel should actually transpire; so, it is not deemed absolutely essential to the offence of the *promoter* that there should ensue a hostile meeting, or even that a challenge should pass between the parties. While there will ordinarily have been either a duel, or a formal challenging, where a case of promoting presents itself calling for a specific charge under this Article,[3] all that is *requisite* is that the acts of the alleged promoter should have been done with the intention to induce or aid in inducing a duel, and should have had a direct tendency to induce one. The intent[4]—where it exists—will in general be suffi-

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or not in the matter of dispute, take any share in urging or provoking those implicated in it to send to one or the other a defiance to the field." Samuel, 394. This writer adds:—"The meddling and mischievous spirit which is ready to mingle itself in the misunderstandings and quarrels of others, is as often prejudicial to the best interests of society as the bad passions of individuals immediately and principally engaged." And see, further, pp. 394–5, a curious recital by the author of the forms in which such spirit may "interpose itself." See also the case of Lieut. Dillon and others, (Samuel, 396; Hough, 190; James, 545.) of whom it is said in the General Order of publication that—"Their interference was equally uncalled for and unnecessary, and tended, not, as might have been expected, to settle the trivial difference which existed between their brother officers, but to magnify its importance and to instigate them to the measure which has led to so fatal a result." And see other cases of instigating and promoting, in James, 397, 437.

1. Note the forms of charge in G. C. M. O. 130, Dept. of the Mo., 1872.

2. See note *ante*, p. 848.

3. In the only precedent which the author has found of *promoting* charged specifically as such and independently of seconding,—that published in G. O. 223, Dept. of the Mo., 1864,—there was an actual duel, the cases of both principals being promulgated in the same Order.

4. That this *intent* is the gist of the offence, see State *v.* Gibbons, 1 South. 49. And compare the analogous cases of the common-law misdemeanor of endeavoring to provoke another to send a challenge, referred to in 1 Russell, 297. The promoting of a challenging of *oneself* by the party addressed, (as done in one of these cases—Rex *v.*

y presumable from the acts themselves without further ıce.

es in which one of the Principals is a Civilian. cases, it may be added, (by way of general remark applica- the offences of the three classes of persons above consid- are clearly equally within the spirit and letter of the Arti- are cases in which both principals are military persons.[1]

nmanders of Guards. The Article further makes pun- e "*as a challenger, any officer or non-commissioned officer, ınding a guard, who, knowingly and willingly, suffers any ı to go forth to fight a duel.*" The general term "any ı" would appear to include civilians as well as military ıs,[2] and, among the latter, persons of any grade; so that a ɔmmissioned officer or officer of inferior rank would be ɛable under the Article for suffering a *superior* officer of ver rank "to go forth," &c. The commander of the guard not merely forbid the person to go forth from the post, ı, &c., but *stop* him, and by force if necessary:[3] if he neg- to do so, he commits the offence here designated. To ete the criminal act or omission the accused must know he intent of the person, in going forth, is to fight a duel. ɔurce of the knowledge is immaterial: "it is not necessary ıe party should be seen to pass the guard."[4] If therefore ɛcused is shown to have received from reliable persons c and timely information of an intended going forth, which ı fact effected, and which he made no proper attempt to stop vent, he will justly be considered to have had the requisite edge, and be held amenable to trial under the Article, pro- the locality of the going forth was within the lines of his or command.

ı Duty Imposed by the Last Clause of the Article. ıjunction with which the Article concludes is, in substance,

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s, 6 East, 464,) would appear to be as much within the general ıtion of the Article as a promoting of the challenging of another. ee O'Brien, 106.

amuel, 388; Hough, 197; Id., (P.) 264; O'Brien, 105.

[ough, 197; Id., (P.) 264.

[ough, (P.) 265.

only declaratory of the duty incumbent upon commanders in g eral to arrest and bring to trial military offenders. From use, however, of the word "*immediately*" it is evident that design of the provision was to impress this obligation with pecial emphasis, and to make it imperative upon commanders check at the outset any scheme or combination looking to a d by the prompt apprehension and prosecution of the principal fenders. A commander, therefore, will properly perform his d under the Article by placing under arrest without delay the pa or parties concerned, and, where he is not himself empowered convene a suitable court for their trial, by preferring charg against them for a violation of the 26th Article, and forwardi the same to the proper superior: for the latter it will remain order a court as soon as practicable.

TWENTY-EIGHTH ARTICLE.

Object and Effect. The object of this Article, (which r peats almost word for word a provision of the Code of James II, is to "protect and save the honor of officers and soldiers, wh shall have courage to refuse the acceptance of challenges, fro every species of reproach which might attend the refusal;"[1] and as a most effective means of attaining this object, it punishes wit dismissal any one who "upbraids"—*i. e.* reproaches, censures, inveighs against, stigmatizes—another for not entertaining a invitation to fight a duel. The most familiar form indeed o upbraiding at the period of the adoption of the Article was "posting" as a coward, by means of a written or printed public notice,[2]—an offence still made punishable in the statutes especially of the older States. Thus, in the laws of Massachusetts,[3] it is

1. Samuel, 402.

2. See the precedent of indictment for the offence of posting in 3 Chitty, C. L., 853. A pointed instance, in our military history, of posting, was that, in 1808, of John Randolph by Brig. Gen. Wilkinson, who, when Randolph, after having unjustly assailed him in Congress, refused to accept his challenge, posted him as a "prevaricating, base, calumnious scoundrel and coward." The leading case tried by court-martial is that of Ast. Surg. Todsen, who was convicted of posting a captain, who had refused him "satisfaction," as "a liar and a coward." G. O. 20 of 1826.

3. General Stats. of Mass., c. 160 § 14. And see a similar statute of New York—3 Rev. Sts., 972; also Act of Congress of Feb. 20, 1839, relating to the District of Columbia—R. S., Dist. Col. § 1166.

:ovided that—"Whoever posts another, or in writing or print es any reproachful or contemptuous language to or concerning ıother, for not fighting a duel, or for not sending or accepting :hallenge, shall be punished by imprisonment," &c.

It is quite clear, however, that the upbraiding intended by the rticle need not be in writing but may be *oral* as well.[1]

The offence committed is moreover equally within the Article ıether the upbraider is the original challenger himself or some her person. An instance of upbraiding by the former is that arged in the case of Col. Sumner,[2] where the officer who had ndered the challenge is alleged to have addressed the other rty in the following terms:—"Sir: I received with great surise your note of last evening, and have only to say to you that man who could insult a brother officer from an official covert, d afterwards refuse to apologize, or to give him that satisfaction ıich he had a right to demand, is utterly unworthy of any farer notice from me." This case also illustrates the point that, ıder the general provision of the Article, the upbraiding may conveyed in a private communication as well as expressed in me public manner.

Proof. If the upbraiding was contained in a written comunication, the same should be set out in full or in substance in .e charge,[3] and proved by showing either that it is in the handriting of the accused, or was written for him and at his instance. 'here it is thus connected with the accused as his personal act, will not be necessary to prove the actual receipt of the communiıtion by the party upbraided; it will be sufficient to show, as in ıe case of sending a written challenge, that the accused duly ıt it in the way of being properly forwarded to such party.

XIII. THE TWENTY-NINTH AND THIRTIETH ARTICLES.

[REDRESS OF WRONGS IN REGIMENTS, &C.]

"ART. 29. *Any officer who thinks himself wronged by the comanding officer of his regiment, and, upon due application to such mmander, is refused redress, may complain to the general com-*

1. See case in G. C. M. O. 48, Dept. of the Mo., 1870; also Lieut. 'ood's case, James, 752.

2. G. O. 2 of 1858. And see Lieut. Wood's case, *ante*.

3. See precedent in 3 Chitty, C. L., 853.

manding in the State or Territory where such regimen tioned. The general shall examine into said complaint proper measures for redressing the wrong complained of shall, as soon as possible, transmit to the Department o true statement of such complaint, with the proceedings had

"ART. 30. *Any soldier who thinks himself wronged by cer may complain to the commanding officer of his regim shall summon a regimental court-martial for the doing of the complainant. Either party may appeal from such reg court-martial to a general court-martial; but if, upon suc hearing, the appeal appears to be groundless and vexat party appealing shall be punished at the discretion of said court-martial.*"

TWENTY-NINTH ARTICLE.

Construction. This is an antiquated provision,[1] now slight significance, and may be very briefly treated.

"Wronged." This undefined but general term is inte as including any and all injuries or grievances that may l or caused by a superior to an inferior officer in his milit pacity or relation, and that are, at the same time, prope *ceptible of being remedied without a resort to a trial by cou tial.* Clode[2] expresses the opinion, in regard to the corre ing British Article, that its object is to provide for the ' ment of professional disputes;" and Hough,[3] that it rel "matters of a professional or private nature." A more s construction would be that the wrongs contemplated are denials of rights or just privileges, or other arbitrary proce in contravention of military usage.

"By the commanding officer of his regiment." T scription has been persistently retained from the original while in the corresponding British Article the more comp sive term, "his commanding officer," was after a time substi De Hart[4] was of opinion that our own Article should be h

1. See Art. 57 of the Code of James II.
2. M. L., 79.
3. Page 229.
4. Pages 78, 253.

›ply to cases of wrongs received from any superior officer; that :ing a remedial statute it might properly be thus freely con- rued. But while such a statute is to be liberally interpreted as its general provisions, its specific terms cannot be extended be- ›nd their distinctive import; and the present Article, being ex- ›ssly confined to cases of wrongs on the part of *regimental* com- anders, must be held to have no wider or other application. The rticle however merely indicates a routine of action, which may , and in practice is, substantially pursued in cases of complaints general, with the difference only that it is commonly simpli- :d by a more direct form of communication.

Procedure under the Article. This is in brief as follows. he aggrieved officer having first specifically applied in writing r redress to the regimental commander, and been refused, or anted but partial, relief, complains by way of appeal, in writing, the general commanding, (commonly the department com- ander,) setting forth the facts of the case, and stating the sub- ance of the original application and its result. This complaint properly transmitted through the regimental commander, who akes such endorsement thereon, or communication therewith, he may deem desirable, and the general is thus possessed of ›th sides of the controversy. If the regimental commander :clines or unreasonably delays to forward the appeal, the officer authorized to transmit it directly. Either the complainant or ıe regimental commander may accompany his statement by fidavits or statements of other persons, or by documentary or :her written evidence. The general will examine the state- ıents, &c., and consider the arguments, and, if he concludes that wrong has been done, will proceed to redress the same, so far it may be authorized and practicable for him to do so, issuing r the purpose the proper order or orders; and will thereupon nder to the War Department the report indicated in the Article. not empowered himself to afford redress, he will properly, in s report, favorably commend the claim to the Secretary of War. n the other hand, if he considers that no wrong was done by e regimental commander, he will formally disallow the com- aint, leaving the officer, if not satisfied, to appeal to higher thority.[1]

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1. On the general subject of the legal effect of this Article and the ocedure under it, the student is referred to Samuel, 499–503; Sim-

A regimental officer, it is to be remarked, is not *require* pursue the routine outlined in this Article. Like any o officer, who has been refused redress for a supposed grievanc his commanding officer, he may address an appeal through proper channels directly to the Secretary of War, by whon will commonly be referred to the chief of one of the staff co or to the division or department commander, &c., for report, in due course disposed of. This is the more usual form of p ceeding, the Article, *as such*, being rarely availed of.

THIRTIETH ARTICLE.

An Inadequate Provision. This Article, which, (dat originally from the code of James II,[1]) has not been materi modified since 1806, is also a provision of comparatively sli value in the code. It entitles indeed a soldier, "who thinks h self wronged by any officer," to a hearing before a court of regiment, and, if he is not satisfied with the result, to an app to a higher court; but the remedy is practically limited to ca arising in regiments; the courts, so far as relates to the mat of redress, are merely investigating bodies without defined powe and the Article fails to indicate what classes of wrongs they m consider, or what authority may be exercised by commanders carrying out their conclusions. Moreover, the effect of the thre contained in the last clause of the Article must rather be to di courage soldiers from seeking relief under it. It has thus bee found inadequate in practice, and is comparatively rarely availe of. Rather than resort to the cumbrous and precarious pr ceedings which it provides, enlisted men prefer in general to a dress their claims, through the proper channels, to the Depart ment Commander or Secretary of War, for authoritative and fin adjustment.

Construction—"*Who thinks himself wronged.*" In th absence of any definition of this term in the Article, the author ities have construed it as referring mainly to such wrongs a result from mistake of fact, misapprehension of law, or want o

mons §369–371; Hough, 229, 236; Stocqueler's "British Officer," 23 Clode, M. L., 79; Maltby, 147; O'Brien, 121–2, 307; De Hart, 78, 253-6 Benét, 170–2; G. O. 1 of 1856.

1. See Arts. 50 and 51 of that Code.

ment on the part of the officer in regard to some matter con-
:d with the "internal economy," as Samuel[1] expresses it, of
:ommand. Errors in the *accounts* of the soldier, as in deny-
o him a right to pay or to an allowance, pecuniary or other-
, to which he is entitled, or in entering stoppages against
to which he should not be subjected, are held to be peculiarly
ıe class of 'wrongs' for which redress is intended to be here
ded.[2] So, such grievances as the imposition of unreasonable
.t,[3] the assigning of improper duties, the withholding of cus-
ıry privileges, may, it is believed, sometimes be sought to be
:died by this proceeding, where the fault of the officer con-
in a misapprehension of facts or lack of discretion rather
in an intention to injure or oppress.

ıt where the act of the officer, as complained of, amounts
ly to a specific military *offence*, it cannot in general properly
me the basis of a complaint under this Article. The regi-
tal court here authorized can neither *try* nor *punish;* and in
ning to pass judicially upon a military offence, it would be
scending altogether its province.[4]

ıe Article is also held to include only grievances which are
onal to the soldier, and therefore not such acts as merely affect
.pline in general;[5] and further, and especially, to contemplate
. wrongs only as are *susceptible of being specifically redressed*
xecutive act, in the due course of military administration.[6]

Page 504.

Hough, 239; G. O. 13 of 1843; Macomb, 90; O'Brien, 127; De
:, 258.

G. O. 13 of 1843; O'Brien, 127, 129.

See Adye, 105; Tytler, 336; Samuel, 505–6; Simmons § 342; Ma-
b, 90; O'Brien, 123, 128, 129, 287; Maltby, 133; De Hart, 257, 265;
). 13 of 1843; I Opins. At. Gen., 167. Simmons writes: "It would
be competent to a regimental court, thus summoned, to enter upon
ıquiry as to a charge of tyranny and oppression, or ill treatment,
ıght forward against the captain or officer commanding a company."
he leading case, in our law, of Private Delap, (G. O. 13 of 1843,)
Secretary of War expressly held that a *striking* of a soldier by an
er was not of the class of wrongs which could properly be made the
ect of a complaint under the present article. The action in Flynn's
, (G. O. 5, Hdqrs. 13th Infy., 1874,) where such a striking was in-
igated by a regimental court under this Article, (though supported
n early case in G. O. 5 of 1827,) must thus be regarded as erroneous.

See Samuel, 504–5; O'Brien, 123.

"It is evidently a personal wrong of such a nature as is capable of
ess that the Article has in view." Samuel, 505. And see O'Brien, 123.

include officers of whatever rank, and whether
company or regiment as the complainant, it i
from the history[1] and text of the Article that i
templated that it would be mainly the acts of
and especially *company commanders* for which
sought. It would seem indeed that the offic
complainant, should be within the command
commander, since otherwise the latter could n
specific recommendation made by the regiment
scarcely be remarked that the "officer" must
i. e. must not have resigned, been dismissed, &c.
complaint is presented and heard; otherwise it
tained.

"May complain to the commanding off
ment." These words, and those which imme
dicate that the present Article, like the last, i
application to cases arising in regiments. A
mander alone can entertain a complaint and su
der the Article: a post commander, where he
mental commander, cannot legally exercise the

"Who shall summon a regimental
This provision is construed by the authorities a
pulsory upon the commander to convene the co
the complainant, as of right, to have it ordere

er receiving the complaint.[1] This general injunction, how-
:r, of the Article is to be viewed as subject to the condition
ıt the matter of the complaint be within its purview: if the
ong complained of is not one which the regimental court is
npetent to entertain, the commander will properly decline to
nvene it.

The "*regimental court*" here indicated is, it should be re-
ırked, not properly a *court* at all. It does not try an accused
on a charge of a military offence, nor does it acquit, convict,
sentence. It merely, as has already been noticed, investigates
d expresses an opinion, and thus resembles a court of inquiry
board much more nearly than a court-martial.[2]

"*For the doing of justice to the complainant.*" Inas-
ıch as the so-called "court" provided by the Article has not
: powers of a court, and as no regimental court is in any event
powered to try a commissioned officer, it is clear that the "do-
; of justice" here contemplated cannot consist, the complaint
ng sustained, in the awarding of a *penalty* in any form what-
:r. To require the officer, for example, to pay a fine or make
apology, would be as foreign to the legal province of the court
it would be for it to impose upon him the punishment of con-
ement. Moreover, being itself without executive authority,
:annot compel or order the officer to redress the grievance suf-
ed, restore the right denied, or otherwise rehabilitate or com-
nsate the complainant.[3] In the absence, therefore, of any indi-

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1. "This provision is imperative and compulsory. It is not a matter
favor or discretion but of right, and is strictly *ex debito justiciæ*." I
ins. At. Gen., 167. "The commanding officer of the regiment has
discretion to exercise, but is absolutely obliged to assemble a regi-
ntal court-martial forthwith, or in such reasonable time as the case
ıy admit." Samuel, 505. And see Simmons § 341; O'Brien, 123;
: Hart, 264.

2. Macomb, (p. 90,) in comparing this court to a court of inquiry,
ls—"or it may be viewed as an *arbitration* or *board* called on to
ust and settle any differences arising in the settlement of accounts
ween the captain and his men." And see I Opins. At. Gen., 167;
ltby, 134; De Hart, 258. In the British Articles a regimental court
inquiry was substituted for the regimental court-martial, in 1860.
mmons § 341: as to the present law, see Army Act § 43.

3. "The court are armed with no authority to award the restitution
any rights of which the individual has been deprived." Hough, 241.
d see Maltby, 133.

cation in the Article as to the form of the doing of justice l court, it is clear that it can, regularly, consist only in the e sion of an opinion to the effect that the complaint is sustaine that the wrong complained of should be redressed in a c mode specified, or—on the other hand—that the complaint sustained and no substantial wrong has been suffered.[1] Thi clusion being duly approved by the regimental commande neither party appealing, the proper orders for effectuating conclusion are issued *by the commander* and "justice" is done in the case.[2]

"Either party may appeal," &c. It is agreed by th thorities that an absolute right of appeal is here conveyed; either party not acquiescing in the determination of the co *entitled* to have ordered a further hearing by a general c martial.[3] No time being specified within which the right be asserted, the general rule of reasonableness is to be ap and an appeal not claimed within a *reasonable time* may ir eral be regarded as *waived.*[4]

"Upon such second hearing." The term "heari well employed, since the proceeding before the general c

1. See Samuel, 505; Tytler, 336; Simmons § 342; Macomb, O'Brien, 123; De Hart, 265.

2. "The colonel or commanding officer, who appoints the reg court, will have to see, if he approves the same, that the deci carried into execution." Samuel, 506. "It will then be the dut commanding officer of the regiment to see the restitution of th of the party complaining, or justice done him." Hough, 240. O'Brien, 128; De Hart, 265.

3. "Either party has an absolute right of appeal." De Ha And see O'Brien, 286; Maltby, 135; Macomb, 89; Tytler, 335. also, in this connection, the remarks of Gen. Augur, in G. C. M Dept. of the Mo., 1884, as follows:—"The right of appeal from mediate commander to a superior one is the right of every of soldier in the Army, and ought to be maintained untrammelled of any resentment on the part of the officer whose acts or decisi thus either expressly or impliedly questioned. To throw any i ment in the way of such appeal or to visit its exercise with confi or threat of punishment, in the opinion of the Commanding G does violence alike to discipline, justice and good order in the Ar

4. "Though no period is laid down within which an appeal be made, it is clear that it ought to be brought as soon after the cation of the regimental court-martial as possible; for some of nesses may die, or be absent, and thus, in some cases, render t impracticable." Hough, (P.) 770.

nore a *trial* in the legal sense of the word than that which taken place before the regimental court, but is simply a re-entation of the case before a body of superior degree and bers. The details of the hearing and the action of the court con will be referred to under the head of the "Procedure."

If * * * the appeal appears to be groundless and vexatious, the party appealing shall be punished at the discretion of said general court-martial." A "groundless" appeal may be said to be one without any substantial foundation: if an appeal have any material reason or merit, however slight, it cannot be said to be groundless. A "vexatious" appeal would be one characterized by a malevolent or litigious spirit, or taken with the intent of annoying the opposite party or withholding the redress due him, or one so entirely without probable cause or reasonable ground that to persist in the proceeding can result in nothing but embarrassment and trouble to the adversary or to the military authorities.[1]

Even in awarding the punishment authorized by the Article, the court does not exercise the power of *sentence* as upon a *trial*. The authority employed rather resembles that resorted to by judicial tribunals for the punishment of *contempts*, and the appropriate penalty will therefore in general be—to be reprimanded or make an apology, or, in a graver case, to be confined or to forfeit pay, or both, for a limited period.

Procedure. The procedure under the Article may be briefly described as follows. The soldier addresses his complaint in writing, preferably through his company commander, to the regimental commander, setting forth the particulars of his grievance or grievances. It is the sentiment of the authorities that where several soldiers have the same grievance, they should not be permitted to combine in a joint complaint,[2] since to allow this would tend to encourage a mutinous or insubordinate feeling, but that

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[1] The mere fact that an appeal has not been successful will not prop-erly render the party amenable to punishment, since he may have pro-ceeded honestly and in good faith, or have failed only because of the absence of material testimony. See Samuel, 507–9; Hough, 241; O'Brien, De Hart, 266.

[2] "As by signing a round robin, or any other paper, stating a gen-eral complaint." Hough, 240.

sees fit, follows with a defence or explanation ar
party may be sworn and testify if he desires. I
right of cross-examination as at a trial. Ea
closing statement or argument. The court th
ates, and frames its conclusion to the effect th
either is or is not substantiated, with a further
be held sustained—of the particular form of re
opinion of the court, should be extended. Th
then reported to the regimental commander, w
the same—as he can scarcely fail to do if th
reasonable—will issue the proper order for ca
the determination of the court.[4]

If an appeal be taken, the appellant applies
lar channels to the department or other proper
general court-martial, which is thereupon or
which the proceedings are similar to those befo
court,[5] except that, if the officer be the appell
the initiative, is first heard, &c. The investig
sued *de novo*, and upon independent testimony

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1. See Samuel, 504; Simmons § 372; Hough, 240
Hart, 267.

2. Such action at this stage would be "irregula
I Opins. At. Gen., 168.

3. Hough, (P.) 763; Hughes, 106; De Hart, 269;

4. In Flynn's case, heretofore noted, the comma
the proceedings, ordered that unless the captain (th

troduced may be the same as or different from that introduced the first hearing, but it is now offered as original and precisely if it had not been before presented. By the consent of parties, deed, the record of testimony received by the regimental court ay be admitted before the general court; but the latter court nsiders the evidence and makes up its opinion entirely indendently of the action of the regimental court and unaffected it. The opinion is to the effect that the appeal is or is not stained,—that the conclusion of the regimental court is either irmed or overruled,—with such additional expression of views to the merits of the case as may be deemed desirable. If the peal be found "groundless and vexatious," an appropriate punment is adjudged. The proceedings are then finally acted upon the commander, and his action is duly promulgated in Orders. 1 officer or soldier who neglects to abide by or comply with the lers of a regimental or superior commander duly issued for the rpose of effectuating the decision of a regimental or general urt assembled under the present Article, is liable to charges d trial as an offender against military discipline.

IV. THE THIRTY-FIRST, THIRTY-SECOND, THIRTY-THIRD, THIRTY-FOURTH, THIRTY-FIFTH, THIRTY-SIXTH, THIRTY-SEVENTH AND FORTIETH ARTICLES.

[UNAUTHORIZED ABSENCES AND OTHER MINOR OFFENCES.]

"ART. 31. *Any officer or soldier who lies out of his quarters, rrison, or camp, without leave from his superior officer, shall be nished as a court-martial may direct.*

"ART. 32. *Any soldier who absents himself from his troop, ttery, company, or detachment, without leave from his commandg officer, shall be punished as a court-martial may direct.*

"ART. 33. *Any officer or soldier who fails, except when prented by sickness or other necessity, to repair, at the fixed time, the place of parade, exercise, or other rendezvous appointed by commanding officer, or goes from the same, without leave from commanding officer, before he is dismissed or relieved, shall be nished as a court-martial may direct.*

"ART. 34. *Any soldier who is found one mile from camp, with leave in writing from his commanding officer, shall be punished a court-martial may direct.*

"ART. 35. *Any soldier who fails to retire to his quarters or tent at the beating of retreat, shall be punished according to the nature of his offence.*

"ART. 36. *No soldier belonging to any regiment, troop, battery, or company, shall hire another to do his duty for him, or be excused from duty, except in cases of sickness, disability, or leave of absence. Every such soldier found guilty of hiring his duty, and the person so hired to do another's duty, shall be punished as a court-martial may direct.*

"ART. 37. *Every non-commissioned officer who connives at such hiring of duty shall be reduced. Every officer who knows and allows such practices shall be punished as a court-martial may direct.*

"ART. 40. *Any officer or soldier who quits guard, platoon, or division, without leave from his superior officer, except in a case of urgent necessity, shall be punished as a court-martial may direct.*"

THIRTY-FIRST ARTICLE.

General Effect and Construction. The offence particularized in this Article, (which is derived from Art. 27 of the Code of James II,) consists in the unauthorized sleeping or retiring for the night, (or some considerable portion of the same,) at a dwelling-house, inn, or other lodging or place, situated outside—the distance is immaterial—of the proper limits of the camp, post, &c., at which the offender is stationed or quartered. The bad example as well as the hazard attending such an offence, when committed by *officers* serving with troops in time of war, must be obvious.[1] At *any* time, it is a species of absenteeism on their part, which, if often indulged in, must tend to destroy the *rapport* which should exist between officer and men, and to loosen the bonds of military discipline. The unsteadying effect of such a practice, if permitted to *soldiers*, need not be enlarged upon. Samuel[2] refers to it as being an offence—"to the injury of the civil neighborhood and the corruption of the morals and dis-

1. See the case published in G. O. 23, Dept. of the Ohio, 1864, of an officer convicted of an aggravated violation of this Article,—in that he "did lie out of quarters, at a distance of four miles more or less from his command, without the knowledge or consent of his commanding officer, at a time when the presence of every officer was required at his post the enemy being supposed to be in close proximity, and did not return until an advanced hour on the following morning, his regiment having marched during his absence."

2. Page 544.

ne of the camp;" and Hough[1] observes—"On service, it is icularly required that all should sleep in their own beds, that · may be easily called out in case of need."

he "superior officer," without whose leave the act cannot be ised, will, as a general rule, properly be the commander of regiment, detachment, post, &c.[2] The "leave," to consti- a defence in the case of an officer, need only be a verbal one: ıe case of a soldier, it should, in view of the terms of Art. ɔe in writing, where the place at which he is to be allowed ass the night is distant a mile or more from the camp or :ters.

THIRTY-SECOND ARTICLE.

ature of the Offence. This Article makes punishable the ıce of *absence without leave* in general, in contradistinction to ıin special forms of such absence which are made the subjects ther Articles, and especially Arts. 31, 33, 34 and 40.[3] The nce here contemplated may be one unauthorized *ab initio*, or which consists in not duly returning at the expiration of a or furlough. The Article, it will be observed, refers only *ldiers*. Absence without leave by an *officer* is not made pun- ble in the code as a specific offence, and is therefore in general e charged under Art. 62.

roof. That the absence was "without leave" should be red affirmatively; it cannot in general properly be presumed ı the mere fact of absence.[4] The fact of the unauthorized :nce should be shown by some witness or witnesses—as the ımanding officer, a company officer, a first sergeant, &c.—per- ılly cognizant of the same. The statement of a witness that accused was "reported" absent without leave would be hear- and insufficient. Similarly would an entry on a morning

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Page 286. And see O'Brien, 93.

See Hough, 286.

'The absence without leave contemplated by Art. 32 is an absence ı camp, post, or station. Absence from roll-call is a mere neglect of ', not a technical *absence without leave* under this Article.' G. O. 14, Fifth Mil. Dist., 1868.

In G. O. 292 of 1863, the Secretary of War, in disapproving certain eedings, says:—"The accused was tried for absence without leave, there is no evidence whatever of an *unauthorized* absence, it not ap- ing but that he might have absented himself with full authority."

by being taken prisoner by the latter, may also
defence;[3] but where he has once deliberately
without authority, the fact that he was detai
than he had intended by some agency beyond hi
no sufficient answer to the charge.

Punishment. The brief unauthorized abs
are, in time of peace, most commonly referred fo
courts by which they are usually visited with a
of pay or other light sentence. The offence,
aggravated and thus call for a serious punish
ample, where the absence was long protracte
soldier, in absenting himself, has abandoned an
or where the offence was committed in time of
words of Attorney General Legaré, "the abse
templation of law, little short of desertion."[4]

Consequences by Operation of Law. Up
out leave, as upon desertion, there are entailed,
law, certain consequences, declared in par. 220 of
lations, as follows:—"Enlisted men who absent
their regiments, companies, or posts, without a
out satisfactory excuse, shall forfeit all pay and

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1. In a case in G. C. M. O. 10, Dept. of the Platte,
of absence without leave was disapproved by Gen. O

ing during such absence, and shall also, upon conviction by court-martial, make good the time lost by such absence."

THIRTY-THIRD ARTICLE.

Effect and Construction. This Article, in its first clause, enjoins the punctual attendance of officer and soldier at parade, drill, guard, inspection, muster, or other exercise, duty, or ceremony of the camp or station, as also at any other place at which he may be ordered to report himself as one of a body. The words —"or other rendezvous," &c., says Hough,[1] "mean any place appointed," by the proper commander, "for the assembly of officers, non-commissioned officers, or soldiers for any duty."

The offence of 'failing to appear at the fixed time,' &c., may consist either in non-attending or attending tardily. The excuse of *sickness* should, of course, as remarked by Samuel,[2] be made out by the testimony of a medical officer. In the case of the offence, specified in the second clause of the Article, of 'going from' the place of exercise or assembly, "nothing," Samuel observes, "will serve as a defence but the absolute leave of the commanding officer."[3]

THIRTY-FOURTH ARTICLE.

Purpose and Effect. This Article, says Simmons,[4] "is of very ancient standing,[5] and appears to have been framed chiefly to prevent marauding, by checking inclination to straggle at great distances from camp during the time soldiers may be unemployed, and when they may be lawfully absent." Samuel observes[6] that "a mile is mentioned as a convenient place, probably, for all purposes of exercise and refreshment. But," he adds, "though this is the prescribed limit beyond which soldiers cannot pass without particular permission, it does not follow that they may not be guilty of a military offence, being found at a

1. Page 288.
2. Page 548. And see O'Brien, 94.
3. Page 548.
4. § 183. And see Samuel, 543.
5. It comes from Art. 20 of James II.
6. Pages 542–3. And see O'Brien, 93.

less distance from the camp than the point described in tl ticle; since it is clear that no one has a right at any time to his place, or the ordinarily fixed bounds, without leave fro officer." It is only, however, where the distance is at l mile from the limits of the camp or line of sentinels that th mission must be in writing: where the distance is less t mile the authority may be verbal merely.[1] In other wor distance of a mile may be regarded as fixing the limits which, as a general rule, a mere verbal authority to be shall be legally operative in the case of a soldier.

THIRTY-FIFTH ARTICLE.

Purpose and Effect. The 'retirement' here indi says Hough,[2] is that "of soldiers to their usual place of re the night; to insure which the names of the men of each pany are called over at retreat-beating." "The Article, serves Samuel,[3] "is calculated to secure the regular and o return of men to the posts wherein they are or ought to be for the night, thus keeping the forces together to act o emergent occasion. * * * The return of troops to quarters at a reasonable time," he adds, "has another advan it gives an habit of retirement to rest at an early hour, ind to the refreshment and health of the soldiery." The writer cites, further,[4] from Sutcliffe's "Combination" the fo ing old order which, in its spirit, is applicable to the army times:—"All manner of persons within the camp or gar after the watch is set, shall repair to their quarter and then silence that every man may rest. All stragglers and tumult persons, that are taken abroad after that time, shall be comm to prison, and there abide until their cause be examined b officers of justice, and order taken for their punishment or missing."

In our service the "retreat" is usually beaten by drum sounded by bugle, at sunset.

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1. See Hough, 285.
2. Page 287.
3. Page 545–6. And see O'Brien, 94.
4. Page 546–7.

THIRTY-SIXTH ARTICLE.

Nature of the Offences—*Hiring to do duty.* Of the provision on this subject in the original British Article, Samuel writes,[1] that it was "framed for the purpose of obviating an abuse which had for some time previously prevailed, and in a very notorious degree, among soldiers quartered in the metropolis or its vicinity, who, being able to find there constant and more profitable employment than in the military service of the country, in work or labor on the Thames, or in the numerous yards and wharfs upon its banks, engaged their comrades to undertake, for a certain proportion of pay, the particular routine of military duty which they would otherwise be obliged to perform."

The consideration paid or given, or agreed to be paid or given—whether pecuniary or otherwise—for the doing of the duty by the party hired, is of course immaterial.[2]

The offence indicated is a rare one in our service. In an Order of the Department of the Missouri[3] is published a case of a soldier convicted of a violation of this Article in hiring another enlisted man to walk his post as a sentinel, while the accused took occasion to desert—an instance which forcibly illustrates the use of the prohibition of the Article.

Being excused from duty. This offence consists in procuring one's self to be excused from a military duty for any cause other than those specified in the Article, or upon a false pretence of the existence of one of these causes. The "sickness" or "disability" which shall constitute an excuse from duty will of course, as a general rule, properly be established by the testimony or certificate of a medical officer of the command or of the army.

THIRTY-SEVENTH ARTICLE.

Purpose and Effect. According to Samuel,[4] this Article, which is supplementary to that last considered, was evoked by the existence of a practice, on the part of officers at an early

period, of consenting to the hiring of duty, upon the condition of receiving a pecuniary consideration, to be derived from deductions from the soldier's "pay or profits."

If, as says Hough,[1] such a practice were sanctioned, two men would in fact be required to perform the duty assigned to one.

This and the previous Article, besides being judicious rules of discipline, illustrate one of the aims of the military law, as a law not only of justice but of honor, *viz.* to preclude the subsisting of anything like a mercenary transaction or relation between officers and enlisted men.

FORTIETH ARTICLE.

Effect and Construction. The main object of this Article, in the view of Samuel,[2] is to keep united the military bodies indicated, and thus secure their efficiency. It is now, however, an antiquated provision, and without significance except in so far as it relates to the offence of 'quitting his guard' by an officer or soldier. This offence has been occasionally made the subject of a charge, and a few rulings upon the Article, with especial reference to this part of it, are to be found in the General Orders. Thus in one Order[3] the quitting of his guard without authority by an *officer of the guard* is commented upon as a grave instance of offence under this Article. In a case in another Order,[4] it is ruled that the description—"any officer," &c., applies to an *officer of the day*, "the guard mounted under his direction in the morning" being "deemed 'his guard' in the sense of the Article." In a further case[5] a conviction under the Article is disapproved because the specification did "not allege the absence of urgent necessity."

It may be noted that this term—"urgent necessity," is evidently of the same import as the words—"sickness or other necessity," employed in another of the Articles of this class, the 33d.[6]

It may also be added that the word "guard" is not to be construed as limited to the regular daily camp or post guard, but as

1. Page 291.
2. Page 550. And see O'Brien, 95.
3. G. C. M. O. 142, Dept. of the Mo., 1871.
4. G. O. 71, Second Mil. Dist., 1867.
5. G. O. 48, Dept. of Ark., 1864.
6. See Hough, 292.

including any formal guard—as an escort guard,[1] guard for prisoners, &c.

XV. THE THIRTY-EIGHTH ARTICLE.

[DRUNKENNESS ON DUTY.]

"ART. 38. *Any officer who is found drunk on his guard, party, or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court-martial may direct. No court-martial shall sentence any soldier to be branded, marked, or tattooed.*"

Origin. This provision, of which the original in our code is Art. 20 of 1775, may be traced, so far as pertains to drunkenness on the part of guards or sentinels, to Art. 51 of the Code of Gustavus Adolphus.

Construction. The principal questions which have arisen under this Article have been raised upon the meaning of the terms—"found on," "drunk," and "duty." To determine in what consists the specific offence, it will be necessary to interpret these several expressions.

"Found on." From the use of these words it is to be implied that the drunkenness of the offender must exhibit itself after he has entered upon, and while he is on, the duty.[2] The Article does not require that the accused shall have become drunk, but that he shall have been found, *i. e.* discovered or perceived, to be drunk, when on the duty, and it does not therefore necessarily follow that his drunkenness shall have commenced after the duty has been entered upon. To permit an officer or soldier, when inebriated, to go upon any duty of importance, while in general involving an injustice to the individual, is also a reprehensible act and a military offence in the superior who *knowingly* suffers it.[3] But the fact that he was already intoxi-

1. See G. O. 48, Dept. of Ark., 1864.

2. Samuel, 551; O'Brien, 136.

3. See G. O. 21, Dept. of Cal., 1869; Do. 14, Id., 1871; Do. 51, Dept. of the East, 1869; G. C. M. O. 5, Id., 1871; Do. 20, Dept. of Texas, 1866; G. C. M. O. 12, Id., 1880; Do. 23, Dept. of Dakota, 1881; DIGEST, 16; also remarks of Gen. Pope in G. C. M. O. 111, Dept. of Cal., 1885.

cated cannot render the party himself any the less legally liable under the Article, if, after having entered upon the duty, his intoxication continues and his condition is detected.[1]

But, on the other hand, a soldier, (or officer,) is not "found" drunk in the sense of the Article, if he is simply discovered to be drunk when ordered, or otherwise required, to go upon the duty, upon which, because of his condition, he does not enter at all. His offence is then chargeable not under this but under the 62d Article.

"Drunk." The state of drunkenness contemplated by the Article may be said to be one which incapacitates the officer or soldier, mentally or physically, for the proper performance of the duty upon which he has entered.[2] There are of course various grades of intoxication, and, under those which are less pronounced, the party may be able to perform the duty imperfectly—to get through it after a fashion but not *properly*. In any such case he is in general to be held to be "drunk" in the sense of the Article equally as if he were totally incapacitated; a due, proper, and full execution being that which is required of him, and his offence being complete where, by becoming intoxicated, he has rendered himself either more or less incompetent for the same.[3] And, as a general rule, in proportion as the duty is diffi-

1. G. O. 11, Dept. of La., 1869; G. C. M. O. 113, Dept. of the Mo., 1873; Do. 12, Dept. of Texas, 1880; DIGEST, 16.

2. See Samuel, 551; Hough, 295; O'Brien, 136; also Orders cited in next note.

3. In G. C. M. O. 33 of 1875, a finding upon a specification to a charge, under this Article, of "guilty excepting the words 'did become drunk,' and substituting therefor 'did become under the influence of intoxicating liquor,'" was disapproved by the Secretary of War, (as drawing too fine a distinction for the practical administration of justice,—see DIGEST, 18,) and the general rule is laid down that—"Any such intoxication as is sufficient to sensibly impair the rational and free exercise of the mental or physical abilities, is drunkenness within the meaning of the law." In G. O. 53, 98, Army of the Potomac, 1862, it is said on this subject: "Unfitness may be more or less complete; but to be intoxicated *at all* unfits a man either to give an order or to execute it." * * * "Nothing can be more erroneous than to suppose that as long as an officer is not drunk to insensibility—a condition, moreover, in which he is far less apt to do mischief than when he is simply drunk enough to be indiscreet—he is not drunk at all. The fullest possession of his faculties, by every officer, is necessary to fit him to discharge his duties properly. These duties are not so simple as to be within the competency of a half-sober person." (Gen. McClellan.) And see re-

or important,[1] and especially in time of war,[2] a less degree toxication may be held sufficient to constitute the offence. where the party is in fact qualified to perform the duty, as it ntended to be, or should be, performed, the circumstance that enlivened or made dull or unwell by his indulgence, will not e render him chargeable under the Article.[3]

should be observed that it is not essential that the drunken- be caused by the drinking of spirituous beverages. As is remarked by Simmons,[4] the offence is complete whether the y found drunk be "under the influence of liquor, *opium*, *or r intoxicating drug or thing*."

***Duty.*"** The connection in which this term is employed— ard, party, or other duty," has at times induced the impres- that only such duty was meant as was similar in its nature to rd duty; that is to say some regular and stated duty for which officer or soldier has been formally *detailed*. But the ruling n early General Order of the War Department,[5] that the Arti- ad "reference solely to duties of detail," was overruled in a Order,[6] in which it was held by the Secretary of War that omission from the present Article, after the word "duty," of words "*under arms*," which were contained in the original

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s of Gen. Augur in G. O. 33, Dept. of the Platte, 1871. In G. C. . 13, Dept. of the Mo., 1882, Gen. Pope refers to the unsatisfactory n of a court in not finding an officer guilty under this Article, as rently owing to the fact that—"while the accused was always more s under the influence of alcohol, he never quite reached the gut- In G. C. M. O. 21, Dept. of the Mo., 1870, Gen. Schofield no- that—"it is not necessary to prove an officer so drunk as to be le to *walk*, or to exercise in some degree his mental faculties, to ict him of being drunk on duty." In G. O. 48, Dept. of Va. & No. 1864, it is held not to be necessary "in order to be drunk" that an must be in such a condition that he cannot *ride*." That drunk- s, intoxication, and inebriation are synonymous terms, see G. O. 3, Army of the Potomac, 1862; I Opins. At. Gen., 296.

As where the duty is that of commander of a separate post. G. O. 21, Dept. of the Mo., 1870.

See G. O. 57, Dept. of Va. & No. Ca., 1863; Do. 2, 48, Id., 1864, 5, Id., 1865.

See O'Brien, 136, 309.

§ 136. And see Hough, (P.) 208; James, 60; also cases in G. O. 1851; G. C. M. O. 49 of 1883.

G. O. 59 of 1843.

G. O. 7 of 1856.

codes of 1775 and 1776, was "*with intention to include all descri tions and circumstances of duty.*" In a third Order[1] this secon interpretation of the Article was expressly affirmed, and it w remarked that "the omission of the words '*under arms*' remov one restriction without introducing a new one," and that "t general words '*or other duty*' provide for all actual occasions duty." Upon this authoritative construction, which has be quite generally followed in practice, it may be held to be the la that not only is drunkenness on guard, drill, police, parade, i spection, muster, court-martial,[2] or any other duty or exercise routine, fully within the contemplation of the Article, but al drunkenness upon any occasion of duty properly devolved upo an officer or soldier by reason of his office, command, rank, o general military obligation.[3]

Continuous duty. While the term "on duty" can scarcely be regarded as so broad or comprehensive, in respect to the periods or occasions embraced, as the phrase "in the line of duty," employed in statutes relating to pensions, bounty and the like,[4] there are yet some instances recognized by the authorities, where officers or soldiers, by reason of the peculiar nature of their office or duty, are considered to be continuously, or during business or working hours, on duty, and thus amenable to charges under this Article if becoming intoxicated during such period. Within this description have been classed *post commanders*[5] and *post surgeons*,[6] who are in general liable to be called upon for duty at any time during at least the business hours of the day. So a *post* or *depôt quartermaster* would ordinarily be similarly amenable during any of the hours in which he may properly be

1. G. O. 5 of 1857.

2. See G. O. 58 of 1831; G. C. M. O. 53 of 1882.

3. As to drunkenness on occasions of *reporting* for duty or for orders see DIGEST, 16.

4. In the Joint Resolution of April 12, 1866, the term "*in the line of duty*" is expressly defined as meaning—"while actually in service under military orders, not at the time on furlough or leave of absence, nor engaged in any unlawful or unauthorized act or pursuit."

5. See cases in G. O. 5 of 1857; G. C. M. O. 10 of 1879; Do. 53 of 1882; Do. 21, Dept. of the Mo., 1870. And compare G. C. M. O. 9 of 1875.

6. DIGEST, 17. And see remarks of Secretary of War in G. O. 64 of 1851.

ed upon for the performance of duties pertaining to his office.[1] *officer of the day* is thus liable if found drunk at any moment is tour of duty whether in the day time or at night.[2]

gain, *in time of war*, and especially in the field before the my, the status of being *on duty*, in the sense of this Article, be uninterrupted for very considerable periods. As re-ked by the reviewing authority, in approving a conviction of officer under the Article early in the late war,[3]—"an officer, n his regiment is in front of the enemy, is at all times *on y*." In a more recent Order of the War Department,[4] in the of an officer found drunk while on duty in command of a pany "on an expedition against hostile Indians," it was held he Secretary of War that—"the nature of the service and the ty of the command certainly constitute this a duty in the se of the Article."

Term of duty. The status of being on duty continues of rse till the duty is executed or the party is discharged or re-ed therefrom. A question, however, as to when the status act-y commences has sometimes been raised in cases of soldiers red to go on guard, or to turn out for parade, drill, &c., and are "found drunk" while being inspected or formed in the s before entering upon the specific duty designated. In these s it has, in some instances, been held that as the soldier, when und, has not yet gone upon the guard, &c., he has not com-ced to be "on duty" in the sense of the Article.[5] But the

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See the recent case published in G. C. M. O. 49 of 1883.

"It is not necessary," to bring his case within the Article, "that fficer of the day should be drunk at inspection of the guard, or at erformance of any particular act as officer of the day. He is liable, nd drunk between going on and going off guard." G. O. 54, Dept. e South, 1875. (Gen. McDowell.) And see Do. 7, War Dept., 1856; 5, Id., 1857. So a member of a camp or post guard is *on duty* not ly while on post as sentinel, but during the entire day or period for h he has been detailed for guard. See above cited G. O. of Dept. e South.

G. O. 57, Dept. of Va. & No. Ca., 1863. And see Do. 1, 48, Id., ; G. C. M. O. 5, Id., 1865.

G. C. M. O. 9 of 1875.

See G. O. 27, 32, Dept. of the South, 1873; G. C. M. O. 2, Div. cific & Dept. of Cal., 1881.

opposite—as held in other instances[1]—is deemed the better view, for although the soldier, in such cases, has not entered upon the duty for which he is finally destined, he is upon the duty preliminary to that, and which is as much a duty as that is, of reporting and being inspected.

What is military duty. The term "duty," as used in this Article, means of course military duty. But—it is important to note—every duty which an officer is legally required, by superior military authority, to execute, and for the proper execution of which he is answerable to such authority, is necessarily a military duty, and this, although it be a duty which a civilian could with equal fitness be employed to perform. Thus an officer or soldier engaged in engineering operations, not connected with military works, under the orders of the Chief of Engineers of the army, or one duly serving upon a *posse comitatus* in aid of a civil official, or acting as an Indian agent under Sec. 2062, Rev. Sts., would, if disqualifying himself by intoxication for the proper performance of the service devolved upon him, be amenable to charges under the present Article.[2]

Proof. The simplest and most satisfactory evidence of the fact of drunkenness will be the statements of witnesses as to the appearance, condition, manner, language or acts of the accused, or other attendant circumstances from which a state of intoxication may be presumed. But as drunkenness is to a great extent a matter of common observation, it is held not to be an infringement of the rule of evidence—that a witness, (not an expert,) shall not be asked or allowed to give his *opinion*—for witnesses, when interrogated as to the condition of the accused, to state, as a fact, that he "*was drunk.*"[3] Further, *military* wi

1. G. O. 11, Dept. of La., 1869; G. C. M. O. 12, Dept. of Tex., 1880. And see Do. 113, Dept. of the Mo., 1873.

2. In the recent and leading case of Runkle *v.* U. S., 19 Ct. Cl. 4[illegible] the court well say: "Whatever service a military officer is lawfully ordered by his superior officer to perform is, in the eye of the law, a military service, though when performed by a private citizen, under the employment of others, it would be a purely civil service. It is the military character of the officer, acting under lawful military orders, which makes the duty a military one, whatever may be the particular description of work involved in the performance of that duty."

3. DIGEST, 255. And see Chapter XVIII—"Statement of opinion, belief."

es, when of the proper rank and experience to enable them estify as *quasi* experts, may be asked their opinion as to ther the accused was or not capable, under the circumstances he case, of properly executing the duty indicated in the spection.

efence. The accused may show that the spirits or drug had ı taken by him as a medicine only, and that because of the ıgth of the dose, a weak head, depreciated health, the heat of weather, fatigue, or other cause, it had over-affected him. he should also prove that the same had been prescribed by a ical officer or physician, since an officer or soldier is not auized to risk incapacitating himself for duty by taking medi- at discretion.

nding. Where the evidence shows that the accused was **k** but not on duty, the court may and properly should find guilty of the specification, *except* as to the averment in regard e duty, and not guilty of the charge but guilty of "conduct e prejudice of good order and military discipline." This is ›f the cases in which such form of finding is especially useful ıppropriate.

XVI. THIRTY-NINTH ARTICLE.

[OFFENCES OF SENTINELS.]

ıRT 39.—*Any sentinel who is found sleeping upon his post, or leaves it before he is regularly relieved, shall suffer death, or other punishment as a court-martial may direct.*"

ject of the Article. The purpose of this provision, (which be traced to Art. 32 of the Code of James II, as derived from 50 of Gustavus Adolphus,) is to secure on the part of senti- that alert watchfulness and steadfastness which are the very ıce of their service. These qualities, important as they are ıe protection from depredation or loss by fire of the public erty collected at a military station, are, in *time of war*, ab- ely essential to ensure a camp or post against the danger of tise and capture by a hostile force. Grave
ions the offences specified in the Artic
the enemy that they become of the

acter, and it is especially to prevent their occurrence at such cri ical seasons that they are made punishable with *death*.[1]

Sleeping on Post—*Proof*. As to the proof of this offenc it should first be shown by the officer or non-commissioned offic whose duty it was to detail and to post the sentinel, that he w duly detailed and duly posted as charged. That he was fou asleep should most properly be proved by the testimony of t officer of the day, or officer or non-commissioned officer of t guard, (or by some member or members of the guard or patr then present,) by whom he was discovered in that conditio That he was actually asleep may be shown by some such fact facts as the following, *viz.*—that accused, (if the offence occurre as it usually does, in the night,) failed to challenge the officer party approaching his post; that he was found lying down, or i a position favorable to sleep, instead of standing or walking hi beat; that he was snoring or breathing as if in sleep; that h did not answer when spoken to, once or repeatedly; that he did not apparently become conscious till touched, shaken, &c.; that when roused he was stupid; that he had dropped or laid aside his musket, or that he allowed it to be taken from him without resistance, &c.

Leaving his Post before being Regularly Relieved—*Proof*. After showing the due detail and posting of the accused, this offence is usually established by evidence that, when the post was officially visited during a tour of duty of the accused, he was not found upon it, and that he had not been for any cause relieved by any officer or non-commissioned officer of the guard or other competent authority. Or it may be shown that he was, under similar circumstances, discovered to be at a place—hi

1. "There is nothing upon which the safety of an army or comma so much depends as the faithfulness and vigilance of sentinels." G. O. 67, Dept. of Washington, 1866. (Gen. Canby.) "The duty of a sen tinel is of such a nature that its neglect by sleeping upon or deserti his post, may endanger the safety of a command or even of a wh army, and all nations affix to the offence the penalty of death." G. O. 8, Army of the Potomac, 1861. (Gen. McClellan.) And see G. O. 1 and 24 of the same command and year; also Samuel, 556–559. Th last named authority refers to another purpose of sentinels, that th "are required to watch that others may sleep, whereby the camp m be seasonably refreshed."

arters for example—quite other than his post, or was seen *off* s post and at a material distance from it.

"Regularly relieved." The Army Regulations,[1] (expressing :ustom of the service,[2]) prescribe that a sentinel's tour of duty, tween reliefs, shall, as a general rule, be two hours; and they :ther direct as to the mode in which a sentinel shall be relieved the end of a tour.[3] In case, however, of illness or other urgency, :urring pending a tour, a sentinel may be relieved temporarily altogether, upon application transmitted in the usual manner the officer of the guard. A sentinel, however, cannot relieve nself,[4] nor can he "regularly" be relieved by another sentinel :ept in the presence and under the supervision and direction an officer or non-commissioned officer of the guard. Referring, a case of the offence under consideration, to the mere relieving sentinels by each other, Gen. Ord well says—"This method conducting guard duty is in direct violation of the Regulations, d sentinels allowing themselves to be thus relieved are liable trial for a violation of the 39th Article."[5]

Defence and Extenuation. It has been held no *defence* to charge of "sleeping on post" that the accused was on guard ie day previous;[6] or that an imperfect discipline had prevailed l the command and similar offences had been allowed to pass ithout notice;[7] or that the accused was not duly posted as a ıtinel.[8] So, to a charge of "leaving post before being regu- ly relieved," it has been held no defence that it was a custom the command for sentinels to relieve themselves, and that the used had but followed this custom.[9]

- Par. 365.
- See Hough, 303; Id., (P.) 180.
- Par. 367.
- See G. C. M. O. 80, Dept. of the Mo., 1875.
- G. C. M. O. 38, Dept. of Texas, 1875. And see O'Brien, 138; O. 166, Dept. of the South, 1864; G. C. M. O. 80, Dept. of the Mo., 5.
- G. O. 74, Army of the Potomac, 1862.
- See Order cited in note 6.
- For "he had lawfully assumed all the responsibilities of a sentinel, d should have been punished for his fault" accordingly. (Gen. Han- ck.) And see G. O. 166, Dept. of the South, 1864; DIGEST, 18.
- For such a custom is "clearly contrary to law." G. C. M. O. 80, Dept. of the Mo., 1875.

Circumstances, however, which could not constitute a leg *fence*, may be admissible as evidence going to *extenuate* tl fence committed and reduce the measure of the punishme to induce a mitigation of the punishment, after sentence, b reviewing authority. Thus it may be shown that the acc when posted as a sentinel, was ill or otherwise disabled;[1] o he had already been overtasked by excessive guard duty or continuous service;[2] or that he had temporarily left his po der an extraordinary stress of weather;[3] or that, in irregı relieving himself or allowing himself to be relieved, he ha observed a usage sanctioned by his official superiors; or tha ing a recruit, he had not been properly instructed in his c as a sentinel.[4]

Punishment. The infliction of the death penalty for tl fences specified in Art. 39 is as old as the history of armies. our practice, the extreme punishment is most rarely, if eve sorted to except in time of war.[6] During the late war of tl bellion it was adjudged not unfrequently for the offence of slee on post.[7]

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1. See G. C. M. O. 136 of 1864; G. O. 72, Dept. of Cal., 1872; 14, Id., 1871; Do. 21, Id., 1869; Do. 20, Dept. of N. Mex., 1862; 20, Dept. of Texas, 1866.

2. See G. O. 10, 62, Dept. of Va. & No. Ca., 1863; Do. 2, Nort Dept., 1865; Do. 67, Dept. of Washington, 1866; G. C. M. O. 44, I of Texas, 1875.

3. Par. 365 of the Army Regulations specially authorizes the relie of sentinels whenever "the state of the weather or other causes n it necessary or proper."

4. See G. O. 74, Army of the Potomac, 1862. In cases where offence of the accused has been in part induced through the neglect oppressive treatment of a superior, the latter has been not unfreque pronounced more culpable and deserving of punishment than the l mer. See G. O. 15, Army of the Potomac, 1861; Do. 10, 62, Dept Va. & No. Ca., 1863; Do. 21, Dept. of Cal., 1869; G. C. M. O. Dept. of Texas, 1872; Do. 80, Dept. of the Mo., 1875; DIGEST, 19

5. "It is said that Epaminondas, in making the circuit of his ca slew a sentinel whom he found sleeping, using this memorable saying 'that he did him no harm, leaving him only as he found him.'" Sa uel, 557.

6. See G. O. 20, Dept. of N. Mex., 1862.

7. To refer only to cases published in the Orders of the War I ment—see G. O. 125, 127, 185, 189, 197, 225, 234, 260, 264 and 1863; G. C. M. O. 31, 38, 75, 81, 113, 151, 235 and 400, of 1864, h

I. THE FORTY-FIRST AND FORTY-FOURTH ARTICLES.

'SING FALSE ALARMS: DISCLOSING THE WATCHWORD.]

ɛT. 41. *Any officer who, by any means whatsoever, occasions ılarms in camp, garrison, or quarters, shall suffer death, or 'her punishment as a court-martial may direct.*

ɛT. 44. *Any person belonging to the armies of the United who makes known the watchword to any person not entitled ive it, according to the rules and discipline of war, or pre- to give a parole or watchword different from that which he 'd, shall suffer death, or such other punishment as a court- ıl may direct.*"

s. 41 to 46. Of this series of Articles—which refer to a ıf *capital* offences pertaining mostly to time of *war*—those : considered together which may be most conveniently as- :d.

FORTY-FIRST ARTICLE.

Object. Samuel,[1] in commenting upon the corresponding 3ritish Article,[2] writes:—"The mischiefs it seeks to pre- re, first, the disturbance of the quiet of the camp or quar- 'hereby the troops might be deprived of that seasonable ıment from sleep, which nature and the fatigues of war requisite; and secondly the harassing and vexing of the 's by unfounded alarms, by experience of the falsity of in former instances they might chance to be deceived ' a true "signal of alarm might be given, or be less able ›osed to exert themselves * * * when their prompt ımediate services should be demanded."

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e the sentence was either commuted or remitted by President ı.

. O. 17, Dept. of the Mo., 1861, is approved a peculiar sentence offence, *viz.*—to forfeit certain pay, to stand on a barrel for a period in the centre of the camp, and to "have a sign hung on k inscribed 'Sleepy Head.' "

ıge 575.

:e its originals in Arts. 14 and 15 of Sec- :s II, and Art. 48 of Gustavus Ad- ıard II and note to same, in App

The Nature of the Offence. For an illustration of the "*false alarms*" recurrence may be had to the form of the cle in the code of 1806, where the language, repeated fron British original, is—"Any officer, who, by discharging o arms, drawing of swords, beating of drums, or by any means whatsoever, shall occasion false alarms," &c. A British Article[1] added, (after "beating drums,")—"makin nals, using words, or by any means whatever." Among " *means*," says Hough,[2] "may be enumerated the sounding of t pets, bugles, or other wind instruments." Samuel[3] observe "by '*other means*' may be intended such noise, or cry, or si or report, as might be raised or made for the purpose of cau or be calculated to cause, an unfounded alarm."

That the alarm was a *false* one will be established by evi to the effect that there existed at the time no material cau occasion which could reasonably induce a general alarm.[4] T before the enemy, in the absence of any warning from the p line or outposts, it would in general constitute an offence unde Article for an officer, within the camp or post, to order the roll to be beaten or otherwise raise the alarm, except on acc of some serious internal cause, as a dangerous fire.

Where indeed there may exist reasonable ground for an al it will not be an offence but the reverse to arouse and notify command by the most effectual means.[5]

The intent. The offence as defined in the later British A cle[6] was that of "*intentionally*" occasioning false alarms such qualification is contained in our Article, and if only alarm be false, that is to say without reasonable foundation, t offence will be complete whatever may have been the intenti That the officer honestly believed that sufficient cause exist for an alarm raised by him when the opposite was the fact, whi not affecting the question of his legal liability to a convictio may properly be shown in evidence as going to extenuate h offence and reduce the measure of the punishment.

1. Art. 55, (and also Art. 71,) of 1873. Clode, M. L., 269, 272.
2. Page 320; also, Id., (P.) 177.
3. Page 576.
4. See Hough, 321.
5. See Samuel, 575.
6. Art. 55 of 1873.

pplication in practice. "From the nature of the Arti-
' observes O'Brien,[1] "it will most generally find its applica-
in a season of war, though its letter does not in any way
ude times of tranquillity." Occasions of conviction under it
: been rare in our army even in war. In an Order of 1863[2]
ıblished a case of a lieutenant convicted of a violation of this
cle in discharging his revolver "several times unnecessarily,"
.e an officer of the advance guard, "thereby causing the gar-
ı to stand under arms." In a more recent Order of the War
artment,[3] is the case of an officer convicted of causing a can-
to be discharged in the garrison, thereby creating an un-
ssary alarm.

FORTY-FOURTH ARTICLE.

rigin. The original of this provision may be found in Art.
f the Code of James II, and Art. 26 of our first Articles of
.

'atchword and Parole Distinguished. The British
mentators[4] distinguish the *watchword* as the 'key of the
p or garrison at night' and the *parole* as 'the passport for
day.' Our Army Regulations[5] define these terms as fol-
:—"The countersign or watchword is given to such persons
:e entitled to pass during the night, and to officers, non-com-
ioned officers and sentinels of the guard. * * * The
le is imparted to such officers only as have a right to visit
guards and to make the grand rounds, and to officers com-
ding guards."[6]

**he two Offences Considered—*1. Making known the
chword to persons not entitled to receive it.*** The

Page 139.

G. O. 76, Dept. of the Gulf.

G. C. M. O. 18 of 1876. This act, however, (committed under the
ence of liquor and in time of peace,) is charged under Art. 62.

Samuel, 571, 573; Hough, 316.

Pars. 350, 351.

And see also par. 1073. Beside the regular watchword or parole, a
al one is "sometimes given preparatory to an action," (O'Brien,
or to the members or officers of a force detailed to execut-
r movement, especially at night.

Article, (which is applicable not merely to time of war, but also to time of peace[1] upon those rare occasions when a countersign is employed,) includes, in the first of the offences designated, all impartings, secretly or openly, of the watchword to improper persons, whatever be the motive—whether, for example, the giving of aid to the enemy, or the facilitating of the admission into the camp or post of unauthorized persons not enemies, or the exit of deserters, prisoners, or other parties absenting themselves without authority.[2] It would include also cases of the offence committed without specific motive, but through negligence merely or want of appreciation of the purpose or significance of the watchword.[3]

What persons are "*not entitled to receive*" the watchword is best ascertained by considering who *are* or *may be* entitled to it. The Article itself indeed indicates in general terms to whom it may be communicated, *i. e.* to those "entitled to receive it *according to the rules and discipline of war.*" Such persons are—*First:* the officer of the day, and the officers, non-commissioned officers, and soldiers of the camp or post guard, provost guard, picket-guard and outposts;[4] *Second:* such officers or soldiers not on guard, members of the families of officers or soldiers, officers' servants, civil employees, or camp-followers, as may be authorized by the commanding officer to pass the lines for any purpose;[5] as well as any

1. See O'Brien, 140.

2. See case in G. O. 242 of 1863.

3. In a case of an officer convicted of improperly making known the parole, Gen. Rosecrans observes as follows:—"His excuse, that he did not know the object and purposes of the parole, and had not noticed what the Regulations contained on that subject, only aggravates his offence by adding to it inexcusable ignorance. After receiving the parole and not knowing its use, he should have sought information before putting it to any use." G. O. 24, Army of Occupation, W. Va., 1861.

4. In nearly all the reported cases the accused was an officer or soldier of this class. See G. O., Army of Occupation, W. Va., 1861; Do. 18, Army of the Potomac, 1862; Do. 45, Dept. of the South, 1862; Do. 28, Id., 1864; Do. 47, Dept. of Washington, 1863; Do. 58, Dept. of the Mo., 1864; S. Field O., Dept. & Army of the Tenn., Jan. 11, 1864.

5. See Samuel, 573–4, where, besides the proper officers and soldiers, he mentions, as persons to whom the watchword may be imparted, "such others as have the common or special privilege" of the garrison, &c.,—"as licensed inhabitants, sutlers, camp-followers and the like. But," he adds, "the countersign is not made known, as of course, to the latter description of persons, but on the sound discretion of the officer in command." And see O'Brien, 140.

other persons military or civil, not connected with the command, who, as visitors or for purposes of business,[1] may be permitted by the same authority to enter the post or depart from it without detriment to its security or prejudice to the interests of the service. In brief the persons intended by the Article are those whom the law and custom of the service recognize as proper persons to be furnished with the countersign, and whom the rules of military discipline do not at the time preclude from being entrusted with it—a class liable to be restricted, at a period of war or other emergency, to a very limited number.

In charging an offence under the Article, it need not be alleged, nor need it be shown by the evidence, *who* the particular persons were: provided they were persons "not entitled" to receive the watchword, it is immaterial whether or not they were personally known either to the prosecution or the accused.[2]

It is no defence that the accused *did not know* that the party to whom he communicated the watchword was a person to whom it was not authorized to be imparted. The Article makes the act punishable without regard to the knowledge of the accused on this subject. The fact, however, that he honestly believed that he was giving the word to a proper person would be admissible in evidence in mitigation of punishment.

2. Giving a parole or watchword different from that received. It is observed of this offence by Samuel,[3] that, "though it could afford no information to an enemy, it might induce the most mischievous and ruinous confusion in the intended operations" of an army.

The term "that which he received" will include of course a second or new parole or watchword where such has been *substituted* for one previously given out for the same night or occasion. The issue of a new countersign, to replace one which has been lost or communicated to the enemy, is provided for by par. 1075 of the Army Regulations.[4]

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1. See Duane's Mil. Dict.—"Countersign."

2. See the allegations in the specifications in cases published in G. O. 242 of 1863; S. Field O., Dept. & Army of the Tenn., Jan. 11, 1864.

3. Page 573.

4. As to the practice of changing the countersign when it is suspected that it has become known to the enemy or "improper persons"—see Samuel, 572; Hough, 317.

It would constitute an extenuating circumstance, though not a defence, that the accused, because of being a foreigner or for other good reason, had not understood the word when given out and so repeated it incorrectly.[1] Hough[2] observes, of the watch-word or parole, that it "should be some short word which is familiar to all and easily to be pronounced."[3] According to the Army Regulations of 1863, (§ 558,) "the parole is usually the name of a general, the countersign that of a battle."

XVIII. THE FORTY-SECOND AND FORTY-THIRD ARTICLES.

[MISBEHAVIOUR BEFORE THE ENEMY AND LIKE OFFENCES.]

"ART. 42. *Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any fort, post, or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer death, or such other punishment as a court-martial may direct.*

"ART. 43. *If any commander of any garrison, fortress, or post is compelled, by the officers and soldiers under his command, to give up to the enemy or to abandon it, the officers or soldiers so offending shall suffer death, or such other punishment as a court-martial may direct.*"

FORTY-SECOND ARTICLE.

Originals. The originals of this and the next Article may be traced in Arts. 9 and 13 of Sec. III of Charles I, Arts. 22, 23 and 24 of James II, and in various provisions of the Code of Gustavus Adolphus, especially in the Arts. numbered 55, 56, 62, 64, 73, 79, 89, 92, 93 and 94. The offence of pillaging is denounced in the still earlier Art. 7 of Richard II.

As Compared with Provisions of earlier American codes. The present Article is Art. 52 of the Code of 1806 expressed in improved English. The existing form is more general

1. See Samuel, 572; Hough, 316.
2. Page 316; Id., (P.) 175.
3. "It (the countersign) ought always to be given in the language most known to the troops." Duane, Mil. Dict.—"Countersign."

than that of 1775,[1] which provided for the punishment of the offences described only when committed "in time of an engagement;" and, as respects the offence of 'leaving post, &c., to plunder and pillage,' is also more general than the form of 1776,[2] which made this act punishable only "after victory." Other details in which the present Article differs from its predecessors will be noticed hereafter.

Misbehaviour Before the Enemy. This offence may consist in:—

1. Such acts by a *commanding officer*, as—needlessly surrendering his command,[3] or abandoning it before the enemy;[4] abandoning, or absenting himself from, his post when expecting an attack;[5] refusing or failing to advance against, attack, or resist, the enemy, when ordered or properly called upon to do so;[6] retreating, or withdrawing his command, before the enemy, without sufficient cause;[7] conducting a retreat in a disorderly manner and

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1. See Arts. 25 and 30; also Nos. 10 and 12 of the "Additional" Articles of November of that year.

2. Arts. 12, 13 and 14, of Sec. XIII.

3. See case in G. O. 87, Dept. of the Ohio, 1864. The leading case in our military history of an officer tried under this Article for a *surrender* is that of Brig. Gen. Wm. Hull, who was convicted of "cowardice" in surrendering Fort Detroit and the "northwestern army" under his command to the British, in 1813, and sentenced to death. The court, however, "in consideration of his revolutionary services and his advanced age, earnestly" recommended him to clemency, and his sentence was approved, but remitted by President Madison.

4. See G. C. M. O. 114 of 1864; G. O. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 37, Middle Dept., 1864; Do. 57, Dept. of the Gulf, 1864; Do. 7, Dept. of W. Va., 1864. An earlier leading case is that of Capt. Dyson, U. S. Artillery, tried and sentenced to be dismissed for running away and abandoning his post of Fort Washington, at the time of the capture of Washington, D. C., by the British. G. O. Tenth Mil. Dist., Nov. 17, 1814; American State Papers, Military Affairs, vol. I, p. 588.

5. G. O. 144, Army of the Miss., 1862; Do. 174, Dept. of the Mo., 1864.

6. See G. O. 18 of 1863; G. C. M. O. 33 of 1880; G. O. 7, Dept. of W. Va., 1864; S. Field O., Dept. of the Tenn., Jan. 11, 1864; Do. 71, Dept. of Washington, 1865.

7. See G. O. 189, 282, of 1863; G. C. M. O. 33 of 1880; G. O. 144, Army of the Miss., 1862; Do. 73, Dept. of Va. & No. Ca., 1864. In G. O. 229 of 1863, an officer was convicted of allowing his command to retreat in disorder before a body of U. S. troops, supposed to be the enemy.

without the proper precautions;[1] failing to rally his force when in disorder but capable of being rallied;[2] procuring himself unnecessarily to be relieved from the command when about to be engaged;[3] failing to succor, support, or relieve, another command, when ordered, or when circumstances make it a duty;[4] neglecting or refusing, when directed by a competent superior, or required by the nature of the duty devolved, to execute a movement or perform a service adverse, or with relation to, the enemy when in his front or neighborhood.[5]

2. Such acts by *any officer or soldier*, as—refusing or failing to advance with the command when ordered forward to meet the enemy;[6] going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire;[7] hiding or seeking shelter when properly required to be exposed to fire;[8] feigning sickness, or wounds, in order to evade taking part in a present or impending engagement or other active service against the enemy;[9] refusing to do duty or to perform some particular service when before the enemy.[10]

Misbehaviour not necessarily cowardice. Misbehaviour before the enemy is often charged as "Cowardice;" but cowardice

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1. Hough, 341. And see G. O. 144, Army of the Miss., 1862. The "misbehaviour before the enemy," of which Maj. Gen. Chas. Lee was convicted, (1778,) was his making an unnecessary and in some respects disorderly retreat, at the battle of Monmouth.

2. See G. O. 57, Dept. of the Gulf, 1864; Do. 73, Dept. of Va. & No. Ca., 1864; Do. 7, Dept. of W. Va., 1864.

3. G. O. 58, Dept. of the Tenn., 1863.

4. See G. O. 18, 189, of 1863; Hough, 341.

5. See G. O. 18 of 1863.

6. See G. O. 204 of 1863; G. C. M. O. 90 of 1864; Do. 421 of 1865.

7. See G. O. 146, 189, 204, of 1863; Do. 27 of 1864; G. C. M. O. 53, 134, 191, of 1865; G. O. 130, Army of the Potomac, 1862; Do. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 57, Dept. of the Gulf, 1864; Do. 37, Middle Dept., 1864; Do. 10, Middle Mil. Div., 1864; Do. 7, Dept. of W. Va., 1864; Do. 73, Dept. of Va. & No. Ca., 1864.

8. G. C. M. O. 114 of 1864; G. O. 22, Mountain Dept., 1862; Do. 21, Dept. of the Tenn., 1863; Do. 10, Middle Mil. Div., 1864.

9. See Samuel, 600; G. C. M. O. 90 of 1864; G. O. 21, Dept. of the Tenn., 1863; also G. O. 37, Middle Dept., 1864, where the allegation, of which the accused was convicted, is—that he "did chew tobacco, and used other means to make himself sick, in a cowardly manner, that he might have an excuse for avoiding the coming engagement with the enemy."

10. See G. C. M. O. 90 of 1864; Do. 53 of 1865.

imply one form of the offence, which, though not unfrequently result of pusillanimity or fear, may also be induced by a treaable, disloyal, or insubordinate spirit, or may be the result of ;ligence or inefficiency.[1] An officer or soldier who culpably s to do his whole duty before the enemy will be equally ırgeable with the offence as if he had deliberately proved reant.

Where the offence may be committed. The offence may committed in a *fort* or other military post as well as in the :n field,—as where an officer or soldier fails or neglects prop- y to defend or guard the post or its approaches, when threat- :d, attacked, or besieged by the enemy.[2]

The act of misbehaviour must be voluntary. The act ıcts, in the doing, not doing, or allowing of which consists the :nce, must be conscious and voluntary on the part of the of- der. The mere circumstance that he is found in a condition intoxication, when called upon to march or operate against the :my, will not constitute the offence,[3] unless such condition ıuld have been induced for the express purpose of evading such vice.

"Before the enemy." This term is defined by Samuel as— n the face or presence of the enemy." It is not necessary, wever, that the enemy should be in sight. If he is confront- ; the army or in its neighborhood, though separated from it by :onsiderable distance, and the service upon which the party is gaged, or which he is specially ordered or properly required by s military obligation to perform, be one directed against the emy, or resorted to in view of his movements, the misbehav- ır committed will be "before the enemy" in the sense of the rticle.

The "enemy" may be hostile Indians, and the offence be comitted in the course of warfare with Indians equally as in a forgn or a civil war.[4]

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1. See DIGEST, 19. Admiral Byng, while convicted of recreancy to ty before the enemy, was at the same time expressly acquitted of wardice.

2. See Samuel, 596; also G. O. 144, Army of the Miss., 1862.

3. Samuel, 597–8.

4. DIGEST, 19. In a case in G. O. 5 of 1857, the accused, a soldier,

Defence. Beside negativing the facts charged, the accus may show in defence that in what he did he was acting und the orders or authority of a competent superior, or was proper exercising the discretion which his rank, command, or duty, the peculiar circumstances of the case, entitled him to use. H may also show that he was suffering under a genuine and extrem illness or other disability at the time of the alleged misbehaviour. Brave or efficient conduct in action or before the enemy, subsequently to the offence, (where the accused, after the commencement of the prosecution—by arrest or service of charges—has been permitted to do duty,) while it may be put in evidence in mitigation of the punishment, and should in general mitigate it very considerably, will not, strictly, constitute a defence.[1] Nor will it constitute a defence, or scarcely an extenuation, that the accused did finally perform the service required of him or otherwise duly conduct himself before the enemy, if, after having originally misbehaved, he was compelled to such service or conduct by peremptory orders or by the use or display of force.[2]

Running Away. This is merely a form of misbehaviour before the enemy, and the words "runs away" might well be omitted from the Article as surplusage. Barker, an old writer cited by Samuel,[3] says of this offence:—"But here it is to be noticed that of *fleeing* there be two sorts; the one proceeding of a sudden and unlooked-for terror, which is least blameable; the other is voluntary, and, as it were, a determinate intention to give place unto the enemie—a fault exceeding foule and not excusable."

Shamefully Abandoning a Fort, Post, &c. Of this specific form of misbehaviour before the enemy, it is to be said that whether or not the abandoning is to be regarded as "*shameful*"

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was sentenced to be *hung*, on conviction of this offence, committed in an engagement with Indians. In later cases of this offence, in G. C. M. O. 36 of 1879; Do. 33 of 1880, committed by officers commanding troops during hostilities against Indians, the accused were sentenced to be dismissed.

1. See De Hart, 144; Ives, 100; DIGEST, 358.

2. In G. C. M. O. 53 of 1865, a specification, (of which a soldier was convicted,) charges that having left his company while engaged in battle, he "had to be threatened to be shot in order to make him rejoin it." And see G. O. 5 of 1857.

3. Page 601.

:pend upon the circumstances of the situation. Generally ng, a commander is justified in surrendering or abandoning ;t to the enemy only at the last extremity,—as where his nition or provisions are expended, or so many of his com- have been put *hors du combat* that he can no longer sustain ctual defence, and, no prospect of relief or succor remain- appears quite certain that he must in any event presently ıb. But, as a general rule, every available means of hold- ɜ post and repulsing the enemy must have been tried and ıiled before a surrender or abandonment can be warranted, the same be resorted to on any less pretext, the com- r will be chargeable with the offence indicated by the Ar- In time of war nothing indeed so fatally compromises the interests, and nothing is so inevitably made the subject of gation and trial,[2] as the premature or unnecessary yielding :he enemy of a fortified post; and when the periods of siege have in many cases been withstood are recalled, it will be iated how possible it may be found to protract a defence circumstances of extreme privation and difficulty.[3]

"*shameful*" quality of an abandonment may be illustrated commander's unnecessarily leaving, to fall into the hands enemy instead of at least destroying them, valuable public under his charge at the post.[4]

term "*post*," it has been said,[5] "has reference to some or position, whether fortified or not, which a detachment ɜ ordered to occupy, or which it may be its duty to defend." :rm "*guard*" is general, but would appear to contemplate 'ance guard, or other outer or special guard, rather than dinary interior guard of a camp or station. The abandon- ɔf a picket post or line, without using every reasonable en- : to hold it and to retard as long as practicable the advance

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ee Samuel, 601–607; Simmons § 196; also the case of "the aban- nt of Maryland Heights and the surrender of Harper's Ferry," :h the result is published in G. O. 183 of 1862.

ee the Resolution of Nov. 28, 1777, (2 Jour. Cong., 354,) which ɜs that it shall be "an established rule in Congress" to institute :stigation in the case of every fort or post abandoned, or taken enemy.

ı the late instance of Belfort, (1870–1,) the defence was continued ɜe months; at Sebastopol, eleven months.

ɜe the case published in G. O. 144, Army of the Miss., 1862.

mmons § 199.

of the enemy, thus enabling the main body to prepare : his approach, would be a marked instance of the offence o doning a "*post or guard*" specified in the article.

"Which he is Commanded to Defend." This ter garded as substantially synonymous with that employed original Article of 1775—"committed to his charge," or th phrase of the corresponding British Article—"committed charge or which it was his duty to defend." It is co that, to constitute the offence, no express or specific inst to defend the post need have been given, but that it is su if an obligation to make a defence was—as it could hardly be—devolved upon the commander as a necessary or rea implication from the order which assigned him to the com or as a duty properly attaching to his position.

Speaking words inducing others to do the like. considering together our original Articles of 1775 and 1 connection with the earlier British form and the comment on of Samuel[1] and Hough,[2] the conclusion is reached th words are most properly to be construed as referring not to the act of abandoning a post, &c., the designation of immediately precedes such words in the Article, but a equally to the general offence of misbehaving before the first therein mentioned and to the specific offence of r away; in other words that "*the like*" refers to any one o of the acts previously mentioned in the Article.

By "words," as here used, may be regarded as included a bal argument, persuasion or threat, language of discourage alarm, or false or incorrect statement in regard to the co or operations of the troops or the movements of the enem whether or not intended to have such effect,[3] may avail t about an unnecessary surrender, retreat, or other derelict fore the enemy. As where a subordinate officer falsely re to his superior, commanding a picket line, that the right line was giving way, and thus induced or contributed to the latter to fall back with his entire command.[4]

1. Pages 607–9. And see O'Brien, 145.
2. Pages 359–362.
3. See Samuel, 608–9.
4. G. O. 73, Dept. of Va. & No. Ca., 1864.

is held by Samuel[1] that the offence is equally committed :her the *words* indicated "be used toward the commanding :r," or toward "the officers or troops under his command." ıe same writer,[2] in holding that the *words* must be "unwar-:d or unauthorized," notices the point that words spoken—vor, for instance, of a surrender—in a *council of war*, con-:d by the commander, will not render an officer amenable to arge under the Article.

ısting away Arms or Ammunition. This offence, :h, from an early period of history, has been viewed as a most ıus one especially in time of war,[3] is, under the present Article, pleted by the act itself of "casting away," whatever its induce-t—whether it be to aid flight or relieve weariness, or a mere nton renunciation."[4] The term "*his* arms or ammunition," the item "his horse, arms, clothing, or accouterments," em-:d in Art. 17, includes not only such arms, &c., if any, as be personal property, but also such as have been furnished ıe government to the soldier for his equipment and use in ervice;[5] the latter being those mainly or almost exclusively :mplated, since it is only in rare cases among militia or vol-:r troops that the soldier will own his arm, &c. Where—as ıs the general rule—the arm or ammunition discarded be-ı not to the offender himself but to the United States, the ce is aggravated; and, in time of war, it is also aggravated ıe further fact that the arm, &c., is likely to fall into the s of the enemy.

ıat the arm or quantity of ammunition which the party is ıed of having cast away, was thrown aside at the order of a nander, in requiring his command to lighten themselves of *limenta*, in order to facilitate a more rapid retreat when pur-by the enemy, or for other military purpose, will of course itute a defence to the charge.[6]

Page 611. And see Hough, 362.
Page 609. And see O'Brien, 145.
See Samuel, 588–591.
Samuel, 592; O'Brien, 146.
Hough, 336; Samuel, 592; DIGEST, 19.
See Samuel, 592.

Quitting Post or Colors to Plunder or Pillag
offence which, if permitted to be indulged in by troop
convert legitimate warfare into mere marauding and a di
military force into a band of stragglers and freebooters,
those which are regarded as the most immediately fat
discipline and *morale* of soldiers, and as calling in all
severe punishment.[1] It has been stigmatized as a grave
crime in all the codes of Articles from a very early peric
General Orders, published during the late war, abound
larations of commanders, denouncing and prohibiting
and lawless foraging,[3] and holding officers responsible for
duct of their commands in this particular.[4] Repeated
distinction pointed out between the authorized taking of
or levying of contributions for the public use, in accorda
law or the custom of war, and the unauthorized and il
propriation of private property by officers, soldiers, o
followers.[5]

The term "*post*" is evidently used here in the most
sense, but as referring to a point for the time fixed. "(

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1. Samuel, 585–6; Army Regulations, § 1094.

2. See the early British Articles referred to at the commence
the consideration of this Article.

3. G. O. 19, Army of the Potomac, 1861; Do. 40, Id., 1862;
Dept. of N. E. Va., 1861; Do. 3, 21, Army of Occupation,
1861; Do. 19, 30, Dept. of the Cumberland, 1862; Do. 5, Dept
Susquehanna, 1863; Do. 15, Dept. of the Gulf, 1862; Do. 23.
1863; Do. 26, 47, Dept. of the Ohio, 1864; Field Circ. 2, Dept. &
of the Tenn., 1864; Do. 10, Army of the Tenn., 1865. In G.
Banks' Division, 1862, the Comdg. Gen. calls upon officers "to
ber the declaration of the great master of the art of war, that pil
the most certain method of disorganizing and destroying an ar

4. G. O. 3, 21, Army of Occupation, W. Va., 1861; Do. 30.
of the Cumberland, 1862; Do. 15, Dept. of the Gulf, 1862; Do.
1863. "An officer who permits" such acts "is equally as guilty
actual pillager." G. O. 107 of 1862. (Gen. Halleck.) In this
tion see 1 Jour. Cong., 268; also Halleck, Int. Law, 442, 461.

5. On this subject, see remarks of Gen. Halleck, in G. O. 107
also Do. 109, Id.; Do. 23, 42, Dept. of the Gulf, 1863; Field
Dept. & Army of the Tenn., 1864. In G. O. 3, Army of Occu
W. Va., 1861; Do. 19, Dept. of the Cumberland, 1862,—teamste
camp-followers are indicated as especially liable to the charge of
plunder. And see G. O. 2, Dept. of Va., 1861.

As to the *levying of contributions*, see par. 1076, Army Regul
G. O. 18, Dept. of the Rappahannock, 1862; DIGEST, 306; and P
"Military Government."

the other hand, is viewed as referring mainly to a regiment or ıer body on the march or operating in the field against the :my.

To constitute the offence there must exist the *animus* indicated the Article—"to," *i. e.* in order to, "plunder and pillage:" s *animus* was expressed still more clearly in the early form[1] by : words—"to go in search of plunder." It must be shown that : officer or soldier left the command with a view to the forci- seizing and appropriating of public or private property; and ether private property sought to be taken belonged to persons stile or friendly can in no manner affect the legal character of : offence.[2] The intent being complete, it is not essential that : property should actually be taken: that it is taken, however, ll of course be the strongest evidence that the offender left his tion for the purpose of taking it.

The offence is no less committed though the quitting of the st, &c., is by a *quasi* authority; as where soldiers go forth for : purpose of marauding under the orders of or in company with officer or non-commissioned officer. In such a case, the act of : superior being prohibited and lawless, the legal offence of the dier is as complete as if he had proceeded alone and of his own tion: his punishment, however, will properly be less severe ın that adjudged his superior.

Punishment. The offences denounced by this Article, occur- g as they mostly do in time of war, and generally in the pres- e of the enemy, and involving the gravest violation of orders of the military obligation, have always been made punishable h the extreme penalty of death.[3] Formerly, for the crime of behaviour before the enemy, this punishment was executed at will of the commander and without trial;[4] and when this me was committed conjointly by any considerable number, their imation, or the summary taking of the life of every tenth man, authorized by the Roman law.[5] Indeed the stern necessity

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Art. 30 of 1775.

So, "the penalty is the same whether the offence be committed in own or in an enemy's territory." G. O. 107 of 1862. (Gen. Halleck.)

G. O. 23, Dept. of the Gulf, 1863—remarks of Gen. Banks.

See Samuel, 594.

Livius, lib. 2: Tacitus, an. 3; Samuel, 595, 600. This punishment

of war will at any time justify a commander in shooting down th leaders of a body of troops who abandon their colors during a engagement, if otherwise their revolt cannot effectually be sup pressed; and a similar extreme measure will be warranted in cas of individual soldiers separately guilty of gross and conspicuo cowardice or misbehaviour in battle, of attempted desertion the enemy, or of violent or aggravated acts of plunder or pillag where peremptory orders to desist are unavailing, and the com mander has no effectual means of restraint within his power.

Such summary proceedings are of course of rare occurrenc Courts-martial, however, when offenders of this class have bee brought before them, have not hesitated to inflict the death pen alty,[1] and during the late war of the rebellion capital sentenc were repeatedly adjudged for marked cases of violation of this Ar ticle.[2] In cases of officers, dismissal has been almost invariabl imposed, and in some instances there has been added disqualifica tion to hold office.[3] In one case a lieutenant was sentenced t be reduced to the ranks.[4] In several cases the dismissal of th officer or discharge of the soldier has been made ignominious by requiring that the same shall be accompanied by a stripping off of insignia of rank, drumming out, shaving of the head, placard ing with the word "coward," or branding with the letter "C."[5]

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was also prescribed in Arts. 60, 67 and 73 of the Code of Gustavus Adolphus, and Art. 8 of James II.

1. G. O. 5 of 1857.

2. See cases published in G. O. 134, 317, of 1863; Do. 64, and G. C. M. O. 90, 272, 279, of 1864; Do. 91 of 1865; G. O. 22, Mountain Dept. 1862; Do. 40, Dept. and Army of the Tenn., 1864; Do. 174, Dept. of the Mo., 1864.

3. G. O. 18 of 1863; Do. 21, Dept. of the Tenn., 1863.

4. "To serve three years or during the war." G. O. 27 of 1864.

5. G. C. M. O. 107, 124, 126, 191, 332, of 1865; G. O. 73, Dept. of Va. & No. Ca., 1864. Hough, (p. 346,) cites a case of an officer sentenced, upon conviction of misbehaviour before the enemy,—to be dismissed, and to have his "coat and commission torn before his face, his sash cut into pieces, and his sword broken over his head in the most public manner." Samuel, (p. 599,) mentions a case of "an adjutant general," sentenced, for cowardice—"to be cashiered, and his sword to be broken over his head, and that he should do the duty of a swabber in keeping clean the hospital ship of the fleet."

In our "additional" Article, No. 12 of 1775, it was prescribed, for the offence of leaving post, &c., to go in search of plunder, that officers should be "cashiered and drummed out of the army with infamy," and that enlisted men should be whipped with from twenty to thirty-nine

The matter of the direction in the sentence as to the publica-
n in the newspapers of the particulars of the case, upon a con-
tion for *cowardice*, and the discontinuance thereupon of social
ations between other officers and one who has been dismissed
such offence—has heretofore been noticed as enjoined in the
th Article.[1]

FORTY-THIRD ARTICLE.

Nature of the Offence. This Article, which has undergone
material change since 1775,[2] refers, according to Samuel,[3] to
using "of direct force or compulsion," in contradistinction
the use of the "influence or persuasion" intended by the pre-
us Article in the act therein specified of *speaking words induc-*
the abandonment of a post, &c. The compulsion need not
sist in the use of actual violence or force. An absolute refusal
bey orders or do duty, or to participate in any further meas-
s of defence, might be as effectual a form of compulsion as if
sical constraint were resorted to. Of the offence Samuel further
tes:[4]—"This amounts to a plain and palpable act of *mutiny*,
ng nothing less in effect than the supercession, or the assump-
n and exercise by force, of the powers of the governor or com-
nding officer, by his refractory troops." The moving cause or
mus of the act, whether insubordination, cowardice, treachery,
, is quite immaterial.[5] It is observed by O'Brien[6] that—"no
unt of suffering, privation, or sickness, to which the garrison
be exposed by the firm intrepidity of the commander, will
l as an *excuse* for the crime."

o instance of a trial for the specific offence made punishable
his Article is known to have occurred in our army.

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s, and, further, that *all* offenders should "forfeit all share of the
er" taken.

Chapter XX—"Dismissal."

The word *it*, after "give," found in the original Article, has appa-
been inadvertently omitted in the present form, and must there-
e understood.

Page 608.

Idem.

See Hough, 359.

Page 148. But compare, in this connection, Art. 73 of the Code of
vus Adolphus.

XIX. THE FORTY-FIFTH AND FORTY-SI ARTICLES.

[RELIEVING, AND COMMUNICATING WITH, THE ENE

"ART. 45. *Whosoever relieves the enemy with money or ammunition, or knowingly harbors or protects an en suffer death, or such other punishment as a court-martic rect.*

"ART. 46. *Whosoever holds correspondence with, or g ligence to, the enemy, either directly or indirectly, sl death, or such other punishment as a court-martial may*

Origin of these Articles. These Articles may be Arts. 3 and 4, Sec. II, of Charles I, Art. 8 of the Code II, and to Arts. 67, 70, 71, 76 and 77 of Gustavus Adol the American military law, they first appear as Arts. of 1775.

This Class of Offences compared with Treason. *as such* is not an offence properly cognizable by a court The offences, however, which are the subject of these cles are treasonable in their nature, and are characterized uel[2] as "overt acts of treason;" by O'Brien[3] as "clos to treason." Our Constitution, (Art. III, Sec. 3 § 1,) that—"Treason against the United States shall consis levying war against them, or in adhering to their enemie them aid and comfort." Wherever, therefore, an overt class specified in these Articles gives substantial aid and to the enemy, and thus evidences, so far forth, an adheren cause, it can scarcely be regarded as less than an act of

1. See Gen. Hull's Trial, p. 118; In the matter of Stacy, 10 Jo Procés du Marechal Ney, Part I, p. 70, and Part II, p. 33; also Dept. of the Mo., 1862; Do. 150, Dept. of the Ohio, 1863; Do. of the Northwest, 1864. "Treason" has sometimes been cha fore military commissions, and, in the English practice, befor martial held under martial law—as in Wolf Tone's case and th Geo. W. Gordon in Jamaica. See PART II.

2. Page 577. And see Id., p. 583.

3. Page 146.

4. See Respublica *v.* Carlisle, 1 Dallas, 39, a case of an indic treason, for giving intelligence to the enemy, &c.; also U. S.

ıay thus happen that an offender whose crime has been com-
:ed upon the theatre of war, and who is thus amenable to trial
ɔr a military offence under one of these Articles, may at the
e time be liable to an indictment for treason. A violation of
Articles, however, will not amount to the latter offence, in
absence of the requisite *animus* implied in the constitutional
ıition.[1]

onstruction of the term "Whosoever." The subject
he interpretation of this initial word of the two Articles, as
cating the classes of persons made amenable thereby to trial
:ourt-martial for the offences therein specified, has already
ı considered in Chapter VIII on Jurisdiction.

FORTY-FIFTH ARTICLE.

**he Offence of Relieving the Enemy with Money, Vict-
s or Ammunition—*"Relieves."*** This word is evidently
ıloyed not merely in the restricted sense of *alleviate* or *succor*,
also in that of *assist*. In the connection in which it is used
ıay be construed as substantially equivalent to *furnish* or *sup-*
The mere giving or selling to the enemy of any of the
ıgs specified, though the same may not really be *needed* by
, is so far, an assistance rendered him, and thus an offence
ıin the Article. That the article furnished is *exchanged* for
e commodity returned by the enemy does not, as noticed by
Judge Advocate General,[2] affect the legal quality of the act.

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ashington, 234, 238, where the court speaks of a form of treason as—
ı adherence to the enemy by supplying him with provisions." In a
ge to the grand jury of the U. S. Circuit Court, in Nov. 1861, re-
:ed in 5 Blatchford, 549, 550, Nelson J. clearly sets forth that giving
lligence, sending provisions or money, and furnishing arms or mu-
ɔns to the enemy, are all overt acts of treason. And see In the matter
ıtacy, 10 Johns. 332; Jones *v.* Seward, 40 Barb. 563; also 4 Black.
ı., 82, (and Christian's note;) Hensey's Case, 1 Bur. 650; Stone's
e, 6 Term, 527.

Thus correspondence with an enemy in regard to matters purely so-
or domestic, while lacking the *animus* of treason, would, unless duly
ıorized, constitute an offence under Art. 46. (See *post.*) In Fottrell
ɛerman, 5 Cold. 280, it was held not to be treason to relieve the sick
wounded of the enemy by renting a building for a hospital to a sur-
ı of the enemy's army—an act, however, which might be regarded
ɔming within the definition of the offence of *harboring* an enemy,
e punishable by Art. 45.

DIGEST, 20–21. And see G. O. 78, Mil. Div. W. Miss., 1864.

It is to be observed that the enemy must be *actually* relieved—reached by the succor or assistance tendered. An *attempt* to relieve him, not successful, will not constitute the specific offence.

"The enemy." This term does not necessarily refer to the enemy's government or army, nor is it required to constitute the offence that the relief should be extended *directly* to either: it is sufficient if it be furnished to a single citizen or to citizens, or to a member or members of the military establishment, in his or their individual capacity;[1] the words thus admitting of the same import as the term "*an enemy*" which occurs subsequently in the Article. In the language of Chief Justice Chase of the U. S. Supreme Court,—"all the citizens or subjects of one belligerent" are "enemies of the government and of all the citizens or subjects of the other," both in "civil and international wars."[2] Relief, therefore, afforded to individuals is relief to *enemies*, and, so far forth also, relief to *the enemy* considered as a nation or government.

It need hardly be remarked that the term "the enemy," or "an enemy," does not include enemies regularly held as *prisoners of war;* such, while so held, being entitled, by the usages of civilized warfare, to be furnished with subsistence, quarters, &c.[3] It would include, however, a prisoner of war who has escaped and while he is at large,[4] as also one who, having been made prisoner of war, has been paroled, and is at large upon his parole.[5]

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1. The term "enemies," as employed in the British statute against treasons, the 25th Edward III, from which our Constitutional provision on the same subject is taken, is defined, (4 Black. Com., 83; Simmons § 1070,) as including—"the subjects of foreign powers with whom we are at open war; pirates who may invade our coast; * * * and our own fellow-subjects when in actual rebellion."

2. The Venice, 2 Wallace, 418. And see The Prize Cases, 2 Black, 666; also case of Mrs. Alexander's Cotton, 2 Wallace, 274; Gooch v. U. S., 15 Ct. Cl. 287–8. The term "the enemy" includes not only civilians, soldiers, &c., but also persons who, by the laws of war, are outlaws—as "guerillas" and other freebooters. See G. O. 30, Dept. of the Mo., 1863.

3. Compare Hough, 328.

4. See the case of harboring, &c., an enemy, published in G. O. 88, Mil. Div. W. Miss., 1864, where the person harbored was an escaped prisoner of war.

5. In the leading case of B. G. Harris, a member of Congress from Maryland, the relieving by the accused, with money, of two soldiers of the army of the enemy, at large under their parole as prisoners of war,

The term under consideration embraces also—as has been spe-
fically held by the Attorney General[1]—an Indian tribe or band
open hostility to the United States.

"Money, victuals, or ammunition." In this enumera-
on the Article is bald and imperfect. Some such addition as
other thing, or *or otherwise* is required to complete and render
lly effective the enactment.[2] "Money" includes of course either
etallic or paper currency, as also money issued by or current with
e enemy as well as money of the country of the accused. As
ld by the Judge Advocate General,[3] the furnishing of money
the enemy is no less a relieving of him where a consideration
received in return than where the amount supplied is a free
ft. And convictions have been had, under the Article, for re-
ving the enemy with money, by purchasing (with money paid)
tton from agents of the Confederate government,[4] as also by
milarly purchasing Confederate bonds.[5] "Victuals" is defined
Hough to be "any article that will support life;" and he con-
udes that all wines, spirituous liquors, "and even water are in-
uded in the term."[6] In the reported cases occurring during
e late war, the most usual form of furnishing an enemy with
ctuals was for the accused to entertain him at meals at his resi-
nce.[7] As to "ammunition," no sufficient grounds are perceived

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d unlawfully within our lines, was considered by the court to be, as
arged, an offence under Art. 45, and the conviction and sentence of
e accused accordingly were duly approved. G. C. M. O. 260 of 1865;
so Proceedings published in Ex. Doc., No. 14, H. of R., 39th Cong.,
t Sess. And compare XI Opins. At. Gen., 204.

1. XIII Opins. At. Gen., 470.

2. In the early Resolution of Congress, *in pari materia*, of Oct. 8,
77, the particulars are stated as—"supplies of provision, money, cloth-
g, arms, forage, fuel, or any kind of stores." 2 Jour. Cong., 281.

3. DIGEST, 20–21.

4. G. O. 14, Mil. Div. W. Miss., 1865—where the accused is convicted
having paid to the enemy's agents about $500,000 for cotton.

5. See G. O. 78, Mil. Div. W. Miss., 1864.

6. Page 327; Id., (P.) 158. In a case published in G. O. 27, Mil.
v. W. Miss., 1865, the enemy was relieved with "flour, coffee, oil,
nes and whiskey."

7. See G. O. 76, 175, of 1863; Do. 51 of 1864. Also G. C. M. O.
5 of 1865, where the accused procured two rebel soldiers to be fed
the house of a neighbor. In the cases of two women convicted of
s offence by military commission, published in G. O. 148, Dept. of the

for ascribing to this word a meaning larger or other than that which it bears in common military parlance.[1]

The Offence of Knowingly Harboring or Protecting an Enemy. This offence may be defined as consisting mainly in receiving and lodging, sheltering and concealing, or shielding from pursuit, arrest, or "any injury which in the chance of war may befall him,"[2] a person known as, or confidently believed to be and who is in fact, an enemy. If the party harboring, &c., is in no manner apprized that the other is an enemy, the specific offence is not committed; but where the circumstances are such as to induce the inference that he is or may be an enemy, it will be for the accused to rebut the presumption that he had the knowledge contemplated by the Article. In the cases as published in General Orders, this offence has commonly been committed by lodging or procuring lodging for officers or soldiers of the enemy's force,[3] or by concealing them, and denying their presence or refusing to furnish any information of their whereabouts.[4]

Proof. It must of course appear that a *status belli* prevailed at the date of the offence, but of the existence of such status the court will ordinarily take judicial notice without proof. Where it is doubtful whether the war had begun at the time of the offence, or had not ended before such time or the time of the ordering of the court, it may be necessary to put in evidence the action of Congress or the Executive in declaring war, announcing the recurrence of peace, &c. A state of war being admitted or established, the fact that the party relieved, &c., was an enemy will be exhibited by evidence that he was a member of the mili-

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Mo., 1863, the enemy, ("bushwhackers,") were relieved by sending and carrying victuals to them in the woods.

1. The view expressed by Hough, (p. 328,) that "ammunition" was synonymous with *munition*, and included arms and other *matériel* of war, does not seem to have been favored by other authorities.

2. Hough, 328.

3. See cases, cited in note *ante*, of relieving an enemy by entertaining him at meals,—in which cases he was generally also lodged.

4. See two cases in G. O. 52, Dept. of the Ohio, 1863. In a case in G. O. 88, Mil. Div. W. Miss., 1864, a seaman was convicted of harboring and protecting a prisoner of war, "by hiding him in the hold of the ship to enable him to escape."

ary force of the enemy, or a citizen or resident of the enemy's country.

Defence. The only justification of an act made punishable by this Article would ordinarily be the order or sanction of a competent military superior,[1] or an authority conferred by an Act of Congress or the President.[2]

Punishment. This, being in the discretion of the court, will commonly be not severe where the relief or harboring is but slight or for a very brief period, or where it is rendered to a destitute person; and will ordinarily be less severe where assistance is rendered to an individual for his personal benefit than where it is rendered to the government or the army of the enemy. But in every case the *animus* of the offender will properly be the most material circumstance to be considered in awarding the punishment. Where his act has proceeded from, or illustrates, a strong sympathy on his part with the cause of the enemy, or a marked animosity towards his own government, he will merit a much heavier penalty than where he was actuated mainly by an impulse of hospitality. Capital sentences were rarely imposed for violations of this Article during the late war; imprisonment and fine being the forms of punishment usually resorted to.[3]

FORTY-SIXTH ARTICLE.

The Offences made Punishable. This Article makes capitally punishable by sentence of court-martial the two distinct acts of holding correspondence with, and giving intelligence to, the enemy; and all material communications made to the enemy

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1. Samuel, 578–9; G. O. 78, Mil. Div. W. Miss., 1864.

2. See the Act of July 13, 1861, authorizing the President to permit commercial intercourse with persons in the insurrectionary States, under which it was held by the Supreme Court, (5 Wallace, 630; 6 Id., 521,) that the President was alone empowered to license such intercourse, and that a military or naval commander was not authorized to do so.

3. An instance of a *capital* sentence is found in G. O. 76 of 1863, here, however, the same was commuted by the President to imprisonment during the war at Fort Delaware. Instances of sentences of confinement at hard labor for *twenty* years occur in G. O. 14, 27, Mil. Div. W. Miss., 1865. In the case of Harris, (G. O. 260, of 1865,) the offender being an official person, (member of Congress,) disqualification for office was added to imprisonment.

will be found to be included within the one or the other description. The terms "*whosoever*" and "*the enemy*" have already been construed under the preceding Article.

Holding Correspondence with the Enemy. The word "*correspondence*" is understood to be here employed in its usual and familiar sense, as intending written communications, especially by letter, and embracing of course communications in print and telegrams. The term, however, is not to be viewed as implying that there has been, or should be, a mutual interchange of letters or communications between the accused and the enemy; nor is it necessary that the communication which is the occasion of the charge should be an answer to a previous one from the party to whom it is addressed. The offence may consist in the sending of a single letter, and this may be the first and the only one that has passed, or been attempted to be transmitted, between the parties.

Any correspondence with the enemy being a violation of the absolute rule of non-intercourse pertaining to a state of war, the Article, naturally, does not characterize the correspondence, the holding of which is made punishable, as treasonable, hostile, injurious, &c.,[1] but makes it an offence to hold *any* correspondence whatever. Not only therefore is correspondence by which valuable information is imparted or important public business transacted, as well as correspondence calculated to stimulate or encourage the enemy,[2] properly chargeable under the Article, but also correspondence of a comparatively harmless character—as the writing of a letter relating to private or domestic affairs.[3] And so of the communicating to the enemy of supposed facts, which however are not true and do not therefore amount to the giving of intelligence.[4]

It is further to be observed that the crime is complete in the writing or preparing of the letter or other communication, and

1. In the "additional" Article of November, 1775, the offence was described as "holding a *treacherous* correspondence."

2. See case in G. O. 190, Dept. of the Mo., 1864; also case, (tried by a military commission,) in G. O. 132, Dept. of the Gulf, 1864.

3. Unless of course such correspondence be expressly authorized by the Government. See *post*, p. 907.

4. See *post*, p. 906, as to the offence of giving intelligence; also as to the punishment—p. 908.

:ommitting it to a messenger, or otherwise putting it in the to be delivered. It is not essential that it be received by ›erson for whom it is intended, or that it reach its place of .nation. If it be intercepted while *in transitu*, the legal acter of the offence will not be affected.[1]

lving Intelligence to the Enemy. This offence will con- in communicating to the enemy, by personal statement, mes- , letter, signal or otherwise,[2] information in regard to the .ber, condition, position, or movements of the troops, amount ıpplies, acts or projects of the government in connection with :onduct of the war, or any other fact or facts, or reports, that instruct or assist him in the prosecution of hostilities.[3]

: the specific instances of a direct violation of this Article :h have been made the subject of trial, some of the principal, ıblished in General Orders, are—the furnishing to the enemy ın of the defences of a military post;[4] the pointing out to ıy's cavalry the road by which a herd of government cattle been driven to avoid capture, and stating that the same was out a guard;[5] the writing and sending letters to a person in ·ebel service in which information was given of the move- ts of troops and of intended military operations;[6] and the ıg of similar information to scouts of the enemy.[7]

is necessary that the enemy shall have been *actually informed.* erefore the intelligence fails to reach him, this offence is not pleted, though the offence of holding correspondence may

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Hensey's Case, 1 Bur. 65; Stone's Case, 6 Term, 527; Samuel, 580; ıublica *v.* Roberts, 1 Dallas, 42; DIGEST, 21; also cases in G. O. 203, :. of the Mo., 1864; Do. 132, Dept. of the Gulf, 1864.

See case in G. O. 26, Dept. of Va. & No. Ca., 1864, in which a soldier ding a prisoner is charged with allowing the latter to escape *for the ›ose* of having him communicate to the enemy valuable information. t. 8 of James II made punishable the giving of intelligence "either tters, messages, signs, or tokens, or in any manner of way whater."

The intelligence may be of a negative character. Thus in Stone's 6 Term, 527, the sending to the enemy a paper containing reasons *ot invading* England was held to constitute high treason.

G. O. 242 of 1863.

G. O. 250 of 1863.

G. O. 371 of 1863.

G. O. 157 of 1864.

be.[1] It would seem also that the
in part at least true, since, if they
cannot be said to be given.

"Either Directly or Indire
strued as applying to both the act
last one only. The modes of hold
intelligence already instanced hav
acter. It was, however, the indi
late war,—as in previous wars,[2]—
lance of the military authorities.
which it was found necessary espe
was the publication in newspapers
numbers, organization, position, o
which information might readily b
and in several instances the offenc
subject of charges under the prese
tary commission.[5] The publishi
newspapers, of "Personals," by m
respondence was maintained with
lines, was also expressly prohibite

Proof. In addition to what ha
ject, (including the observations
apposite here also—as to the prop
a state of war, &c.,) it may be add
ence has been carried on, or inte
communication in the *handwrit*
necessary to prove this in the usual
ter XVIII. Where the communic

1. "It is essential to the offence of
that material information should act
DIGEST, 21.

2. See G. O. of Nov. 27, 1812; Tu

3. G. O. 67 of 1861; Do. 151 of 186
1862; Do. 29, 48, Id., 1863; Do. 44, Id
1862.

4. G. O. 10, Dept. of Washington,
1863.

5. G. O. 29, Army of the Potomac,

6. G. O. 10, Dept. of the East, 186

of a key, or a knowledge of and ability to employ the cipher, must ordinarily be brought home to the party.[1]

Defence. The general principle laid down as applicable to defences to charges under the 45th, is apposite under the present Article.

Under a charge for holding correspondence, where the communication referred solely to private or domestic affairs, it would be a good defence to show that the same was authorized under regulations such as those which prevailed during the late war, by which communications of such a character were permitted to be exchanged with the enemy through the lines at Fortress Monroe.

A not unusual form of defence to a charge of giving intelligence to the enemy, (especially where it was verbally and personally communicated to the enemy in his presence,) has been that the same was furnished *under duress*. But to constitute this defence, the duress must have been such as to put the party in reasonable fear of present *death* if he refused to give the information required of him. Any form of bodily constraint or injury, not immediately endangering life, although it might be admitted in evidence in mitigation of punishment, would not amount to a defence in law. Thus, neither the mere *presence* of a force of the enemy sufficient to overpower the party and destroy him, nor the ordering him peremptorily to furnish the information desired, nor the imprisoning of him until he should disclose facts within his knowledge, would constitute the defence of *duress*, where his life was not seriously threatened or otherwise put in actual peril.[2]

Punishment. The penalty to be awarded will properly depend upon the *animus* of the offender, whether treasonable, treacherous, or sympathetic with the enemy's cause, or comparatively innocent of any such feeling; upon the matter of the communi-

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1. In Smithson's Case, (G. O. 371 of 1863,) the letter conveying intelligence to the enemy was signed with a fictitious name and enclosed in an envelope addressed in *cipher*. See also a case of writing a letter with a fictitious signature in G. O. 203, Dept. of the Mo., 1864.

2. See the analogous case of entering the military service of the enemy under duress, in Respublica *v.* McCarthy, 2 Dallas, 86; U. S. *v.* Vigol, 2 Dallas, 346; U. S. *v.* Greiner, 4 Philad. 396. And compare U. S. *v.* Hodges, Gunner, 465. See also, in this connection, the comments of the Secretary of War upon the finding in Cashell's Case, in G. O. 250 of 1863.

cation—whether beneficial to the enemy, authentic an
or amounting merely to hearsay or rumor; upon the n
form of imparting it—as whether it be communica
enemy's government or its official or military represe
to a private individual, &c. The death penalty has
been adjudged in our practice for a violation of this A
imprisonment has been the more usual punishment.[1]
cases the sentence has required that the accused be se
the lines of the army.[3]

XX. THE FORTY-SEVENTH, FORTY-EIGHTH, NINTH, FIFTIETH, AND FIFTY-FIRST ART

[DESERTION AND KINDRED OFFENCES.]

"ART. 47. *Any officer or soldier who, having receiv*
having been duly enlisted in the service of the United
serts the same, shall, in time of war, suffer death, or
punishment as a court-martial may direct; and in tim
any punishment, excepting death, which a court-marti
rect.

"ART. 48. *Every soldier who deserts the service of t*
States shall be liable to serve for such period as shall, wit
he may have served previous to his desertion, amount t
term of his enlistment; and such soldier shall be tried b
martial and punished, although the term of his enlistm
have elapsed previous to his being apprehended and tried

"ART. 49. *Any officer who, having tendered his res*
quits his post or proper duties, without leave, and with
remain permanently absent therefrom, prior to due notice
ceptance of the same, shall be deemed and punished as a d

"ART. 50. *No non-commissioned officer or soldier sh*
himself in any other regiment, troop, or company, withou
lar discharge from the regiment, troop, or company in whi
served, on a penalty of being reputed a deserter, and suff

1. G. O. 106, 157, of 1864; Do. 67, Dept. of the Gulf, 1865.

2. In a case published in G. O. 14, Mil. Div. W. Miss., 186
tence is confinement at hard labor for twenty years.

3. Thus, in a case in G. O. 58, Dept. of the Mo., 1863, th
was—"To be sent South beyond the lines of the Federal for
see a similar sentence in G. O. 13, Dept. of the Tenn., 1863.

dingly. And in case any officer shall knowingly receive and tertain such non-commissioned officer or soldier, or shall not, after being discovered to be a deserter, immediately confine him and ve notice thereof to the corps in which he last served, the said offi- shall, by a court-martial, be cashiered.

"ART. 51. *Any officer or soldier who advises or persuades any ier officer or soldier to desert the service of the United States, ill, in time of war, suffer death, or such other punishment as a irt-martial may direct; and in time of peace, any punishment, cepting death, which a court-martial may direct.*"

FORTY-SEVENTH ARTICLE.

Previous Legislation. This is Art. 20 of the code of 1806, t materially modified, and—consolidated with it—the Act of ıy 29, 1830, c. 183, prohibiting the imposition of the death pen- y for desertion committed in time of peace. In the code of 75, desertion and absence without leave were made punishable provisions of the same Article—No. 8. In that of 1776, the o provisions were embodied in separate Articles, that relating absence without leave, (now contained in Art. 32,) following ıt after that relating to desertion.

In the British law, desertion—formerly declared a *felony* by tute,[1] and therefore not made punishable as a military offence the earlier military codes—is now, (as with us,) a purely mili- y offence cognizable only by court-martial.[2]

Desertion Defined.[3] A deserter is one who absents himself m his regiment, or military station or duty, and from the serv-

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- Desertion, which was originally a civil offence in the English law, diers not being enlisted by the State, but by private contractors en- ing to furnish certain numbers of men for the army,) appears to have n first declared to be *felony* by the 18th Henry VI, c. 19. See Tytler, 5; Samuel, 71–74; Simmons § 1088; Manual, 8; also Trask *v.* Payne, Barb. 575. In the early (1688) case of King *v.* Dale, (or Beale,) 2 wer, 511, and 12 Howell St. Tr., 262, a soldier convicted of deser- was *attainted of felony* and executed accordingly. By the original ny Act of 1689, desertion was first made punishable by court-mar- within the kingdom.

See Army Act, s. 12.

Besides those whom the military common law defines as deserters, in classes of *officers* have been expressly declared to be such—*viz.* ec. 1229, Rev. Sts., (authorizing the dropping as deserters of officers

ice, without authority, and with the
The offence of desertion thus consis
absence without leave coupled with
liberate purpose not to rejoin the mili
the same altogether, or at least to ter
isting military status and obligation.
revertendi which is the gist and essen

The absence. This may be unaut
as is the case in the majority of inst
not returning at the expiration of a
leave of absence. A soldier may ev
brief leave of absence from his post,
thorized to be thus absent from the pa
incompatible with his deserting from
Further, the absence may be original
by an agency beyond the control of
been taken prisoner by the enemy: i
leased or escaping, he does not retur
to abandon the service; or if, upon h

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absenting themselves without leave for t
presently to be considered.

During the late war, *drafted persons* fai
avoiding the draft, were, by the Act of
subsequent statutes, made amenable to m
deserters, and many of this class were bro
cases in G. O. 85, 86, Northern Dept., 1
O., Dept. of the Monongahela, 1863; G.
Susquehanna, and Dept. of Pennsylvania,
O. of the last-named Dept., of 1865.

1. As defining, or illustrating the defin
323; Hough, 136–7; Id., (P.,) 131; Simn
22; Harcourt, 25; Manual, 20, 21; O'Bri
O. 59, Army of the Potomac, 1861; Do.
Do. 32, Dept. of the Platte, 1869; Do. 6
Dept. of the Mo., 1870; Hickey *v.* Huse
Scituate, 115 Mass. 336, 342; XV Opins.

Desertion *at maritime law* is similarly
ship and her service, not only without lea
party, but with an intent not again to ret
is thus a distinction taken between a mer
final quitting of the ship *animo derelin*
Duties of Merchant Seamen, 129. And
138; Cloutman *v.* Tunison, 1 Sumner, 37

2. See case in G. C. M. O. 90, Dept.
Manual, 21 § 17.

ier duress[1] but of his own choice,) in the enemy's army,—he ı deserter.[2] Again the absence may be caused originally by arrest or imprisonment of the accused, as an offender against local law, by the civil authorities. Or it may consist in an ıidance of military arrest or confinement; as where an officer soldier escapes while held in close arrest or confinement awaittrial or sentence, or while under sentence.[3] And an enlisted lier may absent himself and desert, while already in the status ı deserter from a previous enlistment, the fact that he is amene to justice for a certain desertion not affecting his capacity to ert again.

Nature of the intent. Thus the status of the party at the ıe of the unauthorized absence is immaterial provided such ence is induced by the requisite legal *animus*. This, though ıetimes so described, is not necessarily an *animus* to abandon ɔgether the military service; since a desertion may be comtted in quitting without a discharge, one regiment or comnd, with the view of entering another, and thereupon enlisting rein.[4] The rescinding of the *existing contract* of enlistment—volved indeed in all desertions—may thus constitute the *anis* of, and complete, the offence.

Presumption of the intent. The nature of the intent in sertion is best understood in considering the acts and occurıces from which it may be presumed, its existence being in neral wholly a matter of inference from the circumstances of e particular case. The mere fact of an unauthorized absence a certain period is not, in our law, either conclusive or *prima cie* evidence of the requisite intent.[5] A protracted unexplained

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1. Respublica *v.* McCarthy, 2 Dallas, 86; U. S. *v.* Vigol, Id., 346. And DIGEST, 395.

2. Note in this connection the declaration in G. O. 53, Dept. of the lf, 1863, to the effect that all officers or soldiers giving their paroles prisoners of war, otherwise than as prescribed by the cartel of exıge, will be considered deserters and punished accordingly

3. As to the *animus* in cases of *escape*, see *post.*

4. See "Fiftieth Article," *post.*

5. "Mere length of absence is, by itself, of little value as a test, for a lier who has been entrapped into bad company through drink, or er causes, may be absent some time without any thought of becoma deserter." Manual, 20.

absence affords indeed a strong presumption that the party a sented himself with the *animus* of desertion, and the longer t absence, (prior to the arrest,) the stronger, in general, the p sumption. To infer such intent solely from unauthorized a sence of but brief duration will commonly be unwarranted:[1] absence, however, for a few days or even a part of a day, m under certain circumstances, fully justify such an inferenc and, in time of *war*,[3] an absence of slight duration may be as s nificant as a considerably longer one in time of peace.

The circumstances which may go to indicate that the abse has been actuated by the *animus* in question are numerous a varied, consisting as they may do in acts or declarations of t accused, not only prior to the offence but also pending his a sence, and at the time of or after his apprehension. Among su circumstances the more familiar are—Secretly making prepa tions as for a permanent absence, by collecting or disposing personal effects,[4] &c.; procuring a civilian's dress or other d guise; declarations by the accused to comrades, &c., of a desi to quit the service or command; attempts to persuade others decamp with him; taking a horse, arms, ammunition, clothin rations, or such other property of the government, (or of ind viduals,) as may facilitate a rapid removal, defend against arres protect against the weather, provide sustenance, &c.; taking pa sage on a railway train, steamer, or other conveyance for a dis tant point;[5] the commission, in leaving, of some other militar offence necessary to effectuate the desertion, as a quitting of his post as a sentinel;[6] the fact that he has committed a homicide,

1. See G. C. M. O. 31 of 1876. Bringing to trial for desertion soldiers who have simply been absent without authority for a few days has been not unfrequently condemned in the G. O. See G. O. 19 of 1829; Do. 59, Army of the Potomac, 1861; Do. 57, Dept. of the Mo., 1867.

In G. O. 84 of 1885, it is directed as follows:—"No man shall be *reported* a deserter until after the expiration of ten days, (should he remain that length of time away,) unless the company commander has conclusive evidence of the absentee's intention not to return."

2. An absence of an *hour* was held sufficient where the accused was pursued and apprehended in the act of flight. G. C. M. O. 33, Dept. of the Mo., 1870.

3. See the stringent order of Gen. Terry in G. O. 11, Twenty-Fourth Army Corps, 1864.

4. Hough, 137; Pipon & Col., 152.

5. Samuel, 323; Simmons § 182; Manual, 20.

6. Hough, 142.

ny, embezzlement, or other crime, for which he would have liable to severe punishment;[1] the fact that, in leaving, he scaped from a confinement or close arrest; his writing, dur- is absence, to comrades, &c., declaring an intention not to n; his assuming, during absence, a false name, or resorting ier means to conceal his identity and avoid detection; his apprehended at a long distance from his station;[2] his being ed and overtaken when in evident flight; his being found, rest, dressed wholly or partly in civilians' clothes,[3] or other- disguised; his resisting arrest; his denying, upon arrest, lentity, making false or contradictory statements, or failing plain satisfactorily his absence;[4] his surrendering himself *deserter*, &c.

nstruction of the Article—"*Having received pay ving been duly enlisted.*" These words are evidently ded to include all persons who, as officers or soldiers, have ed into a formal or informal engagement or enlistment, as nced by their receipt of pay or otherwise, to render military e to the United States.[5] In what consists an enlistment een considered under the "Second Article."

***n time of war.*"** This term, as employed in the Articles ar, has already been construed as including not only foreign il war but a period of hostilities against an Indian tribe.

. ***court-martial.*"** Under this general description, deser- (committed in time of peace, when it is not a capital offence,)

Simmons § 816; Hough, 138; Pipon & Col., 152; G. O. 32, Dept. e Platte, 1869; G. C. M. O. 52 of 1877, (Lieut. Fleming's case;) ST, 221–2.

But that desertion cannot "invariably be judged by distance"— immons § 183, repeated in Manual, 21.

Samuel, 323; Hough, 137; Pipon & Col., 149; Manual, 20, 21; en, 96; G. O. 91, Army of the Potomac, 1863.

G. O. 91, Army of the Potomac, 1863; Do. 33, Dept. of the North- 1864; Simmons § 878.

The view of O'Brien, (p. 96,) that, of these words, those alluding receipt of pay were intended to apply rather to officers than to rs, is not sustained by a reference to the history of the Article as d from the British Mutiny Act. The present phraseology would nplified and improved by omiting altogether these words, and g the Article read—*Any officer or soldier who deserts the military of the United States shall, &c.*

may legally be taken cognizance of by a regimental or garr court. In view, however, of the limited power of sentence ve in inferior tribunals by Art. 83, cases of desertion are invari referred for trial to *general* courts in time of peace equally a time of war.

Charge. Forms of charges of desertion are given in the pendix. It need only be observed here that the specifica should state whether the accused surrendered himself or was prehended, and, where the desertion charged is a second offe may properly so aver by way of inducement.

Plea. The subject of pleading guilty, under a charge of de tion, to the lesser offence only of absence without leave; as the subject of the introduction of evidence in connection w the plea of guilty of desertion, and of the relation between "statement," (if any,) and the plea where such plea is in posed—have been considered in a previous Chapter.[1]

Proof. In order to substantiate a charge of desertion un this Article, it is necessary to establish—1, The fact of a rece of pay by the accused as an officer or soldier, or of his due enli ment; 2, The fact that he absented himself without authorit 3, The fact that he did so with the intention not to return. T *onus* of proving each of these facts rests upon the prosecution.

Proof of receipt of pay or enlistment. It will rare be necessary to present this part of the proof in a formal manne The accused indeed will generally admit of record, or not contes the point that he is duly in the military service within the co templation of the Article. In rare cases,—as where a soldie claims that his enlistment was illegal and void,—it may becom essential to introduce, (in the original or by copy,) the enlistmen contract or the official roll containing a receipt of pay signed b the accused, or, in the absence of such written testimony, som competent parol evidence either of an actual receipt of pay or o acts held equivalent in law to a formal enlistment.[2] Commonly, however, it will be sufficient to identify the accused as one who having voluntarily served and acted as a soldier, (or an officer,) o

1. Ch. XVI.
2. As to these acts, see under Article 2, *ante*.

he regiment, or corps, &c., named, is estopped to deny his amen-
bility as such.[1]

Proof of the unauthorized absence. This is in general
eadily made by the commanding officer, first sergeant, or other
fficer or non-commissioned officer of the command who is cog-
izant of the fact. If it is alleged that the offence was commit-
ed when the accused was on leave of absence or furlough, the
vritten authority, or its details, should be put in evidence, with
roof that the accused failed to return at the proper time. Proof
nerely of absence is not proof of absence without authority, nor
oes it impose upon the accused the *onus* of showing that he had
uthority: the want of authority must be affirmatively established
y the prosecution. Thus it has been held that evidence that a
oldier, when absent from his post, was arrested, was not proof
hat he was absent without authority.[2] A mere *attempt* by a
oldier to absent himself without leave has also been held not to
e sufficient evidence of an unauthorized absence.[3]

Proof of the intent. Except where established by a specific
leclaration of the same by the accused, the fact that he absented
himself *animo non revertendi* is proved as a presumption[4] from
ome one unequivocal fact, as an unexplained long-protracted ab-
ence without authority, or—more commonly—from a combina-
ion of circumstances having a similar significance. The more
amiliar of such circumstances have already been instanced as
llustrating the definition of desertion, and need not be repeated.
t may be added that facts should not be accepted as proof of the
ntent, which, though casting suspicion upon the accused, are yet
onsistent with his innocence. As, for example, the fact that
while absent without authority he was *arrested as a deserter.*[5]

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1. In some cases the proceedings have been disapproved on account of the absence of *any* proof whatever of receipt of pay or enlistment. See, for example, G. O. 2, Dept. of the East, 1863; Do. 31, 45, 52, 63, Id., 1864; Do. 5, Id., 1865.

2. See G. O. 50, Dept. of Cal., 1867.

3. See G. O. 27, Dept. of Dakota, 1868.

4. "Presumptive evidence on this point is generally the best that can be produced." O'Brien, 304.

5. G. C. M. O. 1, Dept. of Texas, 1875; Fitchburg *v.* Lunenburg, 92 Mass. 358. Nor does the fact that, upon arrest, he was closely *confined* imply in law anything more than that he is *charged* with the offence. See G. O. 50, Dept. of Cal., 1867.

It is a matter of common knowledge that soldiers, when thu sent, are not unfrequently arrested by policemen or others w view to the obtaining of the reward for the apprehension o serters; but from such an arrest alone, even in a case wher reward has been paid,[1] it would not be safe or just to pres that the soldier was absent with the *animus* of desertion. this *animus* is not to be presumed from the mere fact alone the soldier has *escaped* from a confinement, since he may liberated himself for some such purpose as the procurin liquor, tobacco, &c.[2]

In making proof of the intent it is important to require witnesses to confine themselves to *facts within their knowle* not merely as distinguished from hearsay[3] but from opinion; being one of the instances where witnesses are most apt to s *conclusions* which it is not for them but for the court to ded Thus a witness should not be asked whether the accused "deserted," or what he knows about his "desertion," or the l Nor should he be allowed in his testimony to characterize the of the accused as a "desertion" or to speak of him as hav "deserted,"—at least without stating the specific facts upon wh his deduction is based. The author has had occasion to exam cases where the sole testimony upon which the conviction founded was that of an officer or non-commissioned officer to effect that the accused "deserted" at a certain time. Such assertion is not, strictly, evidence, and where admitted in e dence should not in general be accepted by the reviewing auth ity as sustaining the finding.[4]

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1. G. O. 30, Northern Dept., 1864; G. C. M. O. 55, Dept. of the M 1872.

2. In G. O. 87, Dept. of the South, 1872, a conviction of desertion disapproved on the ground that the evidence showed "merely an esc from the guard-house without intention to leave the service or the cinity of the post." In G. O. 32, Id., 1873, a similar conviction disapproved in a case where it appeared that the escaping was the act a drunken man to obtain more liquor. And see DIGEST, 223, with citation, (in note,) from Samuel, 324.

3. That it is important that the evidence should be direct and hearsay is noticed in G. O. 39, Dept. of the Platte, 1871. And see O. 8, Dept. of the Gulf, 1873; G. C. M. O. 37, Dept. of Texas, 187

4. In a case in G. C. M. O. 1, Dept. of Texas, 1875, where the o witness testified that the accused "deserted," and was subsequently rested and returned "as a deserter," the conviction was disapproved

Written evidence—Charging desertion distinguished from proof of it. It is also important to remark that a note or ntry upon a muster-roll, morning report book, descriptive list or ther official certificate or statement, to the effect that a soldier as deserted, is no proof whatever of the intent essential in deertion, nor admissible in evidence to establish the commission of he offence, upon a trial by court-martial. Such an entry or recrd is, so far as respects such a trial, a *charge* of desertion and o more. No statute has made it proof of the offence, and to old it so would be to substitute the opinion of an officer for the etermination of a court-martial—the only authority empowered o find the offence and affix the penalty. Whatever effect, therore, it may have for other purposes, it cannot legally be availed f as proof of desertion before a military tribunal.[1]

Defence. The accused may show in defence that he has either received pay in the service nor been legally enlisted herein, and is therefore not amenable under this Article.[2] Or

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Gen. Augur, on account of the insufficiency of the evidence. And see DIGEST, 222.

1. "Upon the muster-roll, which is made every two months, the reaons and time of absence of each soldier are required to be entered," (by he 12th Art. of war,) "and entry of the word '*deserted*' by the comnanding officer of the company, (who is then to account for all the men f his command,) against the name of the soldier, is in the nature of a *harge* against such soldier of the crime of desertion; but it is *not an adjudication* that he is guilty of the offence, which, as it is one of the gravest offences known to the military law, can be made only by a courtmartial." Devens J., in Hanson *v.* S. Scituate, 115 Mass. 341. "He is ot made a deserter by the entry of his name as such in the company ooks." G. O. 10, Dept. of the Platte, 1871. "The entry on the roll f a company that a soldier has deserted is not proof of the offence, but nerely evidence that he has been charged with its commission." Circ., Dept. of Dakota, Jan. 3, 1873. "The descriptive roll introduced as evilence against the prisoner for desertion was simply no evidence whatever, nd he could not legally be convicted of desertion upon it. * * * The oll was not evidence: * * * is not legal evidence: * * * was not roper evidence." Four cases in G. O. 29, Northern Dept., 1864. And ee Do. 91 of 1881; Do. 12, Middle Dept., 1865; G. C. M. O. 33, Dept. f the Mo., 1875; Do. 22, Dept. of the East, 1882; Do. 1, Dept. of Texas, 1883; DIGEST, 222. So, in G. O. 30, Northern Dept., 1864, an fficial communication from a quartermaster to a company commander, n which the former informed the latter that he had paid the reward for he arrest as a deserter, of a soldier belonging to the company, was roperly held to be no evidence of the desertion.

2. See *ante;* also under Second Article—"Enlistment." That it is

he may show that his absence was not unauthorized: and it be a good defence that he was absent in good faith by the per sion of a superior, although the latter may have had no autho to allow such absence. So it will be a good defence that the cused, being absent by authority, was prevented from return at the expiration of his leave or furlough, by serious disab illness;[1] but this defence must, if practicable, be sustained by evidence of a medical officer of the army, or, in the absenc such an officer, a civil physician. It will further be a suffic defence to the charge of desertion that the absence of the acc was caused by his being, (involuntarily,) taken prisoner, and l as a prisoner, by the enemy;[2] or that it was occasioned by being forced by his comrades to leave the company;[3] or tha was the result of his having been arrested and detained in c finement by the civil authorities.[4] Having been so arrested held after a desertion had been *consummated* would of course unavailing as a defence.

It will also be a good defence that the deserter has been resto to duty by competent authority under par. 218 of the Army Re lations, which clearly contemplates that, upon such restorati a *trial* shall be dispensed with.

It would further be a complete defence, that the accused ga himself up under and within the terms of a proclamation of t President, offering amnesty or exemption from trial to soldie absent in desertion if duly returning to the service.[5] It mu appear indeed that the accused has complied with the *condition*

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no defence that he had not received all the pay due him, see Hutch ings *v.* Van Bokkelen, 34 Maine, 133.

1. Compare the similar provision of the maritime law, stated by P thier—as cited by Curtis, in Rights and Duties of Merchant Seamen, 13

2. Pipon & Col., 56. As to the defence of *duress*, to a charge desertion to the enemy, see DIGEST, 395; also Chapter XVII—"Co pulsion of the enemy, &c."

3. This defence was recognized as sufficient in G. C. M. O. 97, Dep of Cal., 1884.

4. See G. C. M. O. 55, Dept. of the Mo., 1872.

5. See the proclamations and announcements of this character publishe or referred to in the following General Orders of the War Departmen viz:—G. O. of Nov. 5, 1811; Do. of June 17, 1814; Do. 35 of 1848; D 58 of 1863; Do. 35 of 1865; Do. 43 of 1866; Do. 102 of 1873. A pro lamation of this kind was directed to be issued by Gen. Washingto by a Resolution of Congress of Oct. 17, 1777. 2 Jour. Cong., 294.

: any, of the pardon or immunity offered—as, for instance, that e returned voluntarily, and within the specified time.[1]

Whether it would constitute a defence to a charge of desertion hat, at the date of his absenting himself, the contract of the soldier had been, or was believed by him to have been, performed, ould depend in a measure on the circumstances of the case. A oldier cannot assume to discharge himself;[2] but where, the legal erm of enlistment having fully expired, the soldier duly applies or but fails to receive, within a reasonable time, the discharge ue him, he can scarcely be charged with the crime of desertion he thereupon withdraws himself from the military service. uch cases, however, must be most rare. Where indeed, as ocurred in some instances during the late war,[3] the soldier abanons the service under a *bona fide* but mistaken idea as to the uration of his term, which in fact has not yet legally expired, is error will constitute no *defence* to a charge of desertion, though will materially extenuate the quality of the offence committed.

It may be added that it has been held no defence that the ccused, when he deserted, was a deserter from a previous enlistent, since this fact did not make the second enlistment void ut voidable only at the pleasure of the government.[4]

Upon the defence the accused may put in evidence any facts ending to negative the presumption that he absented himself rith the *intent* of desertion;[5]—as, for example, the fact that he bsented himself when under the influence of liquor; that when

1. G. O. 61, Dept. of the East, 1865.

2. *Ante*—"Fourth Article."

3. See, for example, case in G. O. 77, Dept. of the Cumberland, 1867, here the defence of a soldier, charged with desertion, that, having been nlisted *for the war*, he had a right to leave the service when active ostilities were over, was held by Gen. Thomas to have been improperly ccepted by the court. See also case of soldiers—about two hundred—f the First Michigan Cavalry, who, having re-enlisted, in December, 863, "for three years or during the war," and having been ordered in une, 1865, to New Mexico to quell an Indian outbreak, left the regiment nd returned to their homes, and were held to be deserters. XVI Opins. t. Gen., 675. Also cases in G. O. 80 and 108, Army of the Potomac, 862, of members of a volunteer regiment who left the service in the beef that their three months' term had expired, and were held properly eated and convicted as deserters. And compare Wilbur *v.* Grace, 12 hns. 72.

4. G. C. M. O. 83, Dept. of the Mo., 1873; Do. 67, Dept. of Cal., 1884.

5. "Every facility should be given him to introduce testimony in his fence." G. O. 91, Army of the Potomac, 1863. (Gen. Meade.)

hibit in evidence facts and circumstances which, stituting a defence, may avail to extenuate his c court or the reviewing officer. Such as that—he self in good faith, under a claim, honest and no foundation, that he was entitled to terminate hi he had been subjected to cruel or arbitrary punis oppressive treatment by his superiors;[6] that he l to his act by the continued hostility of comrades been advised or incited to desert by an officer of

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1. G. O. 10, Dept. of the Platte, 1871.

2. Samuel, 324; G. O. 32, Dept. of the South, 1873

3. Hough, 141; G. O. 10, 52, Dept. of the Platte, 1 174, Dept. of the East, 1871; Do. 29, Dept. of Cal., 18 return from absence is of course to be distinguished *as a deserter.*

4. See Hough, 141.

5. Text, *ante.* And see cases in G. O. 80, 108, Arm 1862; Do. 77, Army of the Cumberland, 1867.

6. See cases in G. O. 13, Dept. of the Tenn., 1867 the Lakes, 1870; G. C. M. O. 58, Dept. of the East, 18 Dept. of the Lakes, 1870, "the rough and inhuman accused) received from *members of his company*" is refe for the remission of the sentence. And compare citati note *post.*

7. Cases of this description are found in G. O. 31, D 1866; Do. 53, Dept. of Washington, 1867; Do. 14, S 1867; G. C. M. O. 102, Dept. of the Mo., 1871; Do. 6 29, Dept. of Cal., 1874. And see a case in G. C. M. the Mo., 1872, where the *acquittal*, on a charge of dese who had been induced to absent himself by having be ject of a mock trial and sentence by a pretended court- the men of the company, with the permission of th mander,) was approved by Gen. Pope.

8. In a case in G. O. 22, Dept. of Va., 1863, the sol to desert by being told, in the presence of men of the officers, impatient of his worthlessness, that they "wisl

ıt he had been induced to leave by the prevalence of an epi-
mic or contagious disease at the post;[1] that his rations had
en for a considerable period deficient in quantity or quality;[2]
ıt he had not been furnished with proper quarters, or sufficient
thing or blankets, especially in winter;[3] that his pay had been
an unreasonably long period in arrears; that he was young
l inexperienced in the service, and had been influenced by the
l advice or example of older soldiers or of a non-commissioned
cer deserting with him; that he had never been made ac-
ainted with the Articles of war and did not comprehend the
ıvity of the offence;[4] that he surrendered himself as a deserter
er but a brief absence.[5]

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t, and that they would be willing to pay his passage" if he would go.
disappeared accordingly but was subsequently arrested, tried, and
erely sentenced. It was held that the conduct of the officers was an
nvitation" to the soldier to commit the crime, and the sentence was
great part remitted, by Gen. Dix.

1. See G. O. 26, 27, Dept. of the Mo., 1867. *Contra*—G. O. 35,
th Mil. Dist., 1867.

2. At maritime law, "it is not desertion to leave the ship on account
cruel or oppressive treatment, or for want of sufficient provisions in
rt when they can be procured by the master." Curtis, Rights and
ıties of Merchant Seamen, 131. What would absolutely excuse deser-
n in the merchant service may reasonably be held to palliate it in the
ıilar but stricter law of discipline governing the soldier.

3. In a case in G. O. 19, Dept. of Cal., 1866, a sentence of a deserter
mitigated by Gen. McDowell, for the reason that, upon his enlistment
d during the months following of November and December, he had
d neither clothing nor blankets issued to him, though abundant sup-
es of the same were on hand.

4. In a case in G. C. M. O. 73, Dept. of the East, 1872, Gen. Mc-
owell mitigates the sentence, for desertion, of a recruit, "in consider-
on of the fact that he had been in service but a few days, and had not
ard the Articles of War."

A case may be noted here, which, in 1869, was brought to the atten-
n of the Secretary of War, by the diplomatic representative of Switz-
and at Washington, of a Swiss—George Tobler—who had enlisted
our army and deserted, in whose behalf it was urged that his offence
d been induced by nostalgia, or *maladie du pays*. While this fact
ıld not be accepted as excusing the offence, (especially as the right
expatriation is asserted by our laws—Sec. 1999, Rev. Sts.,) the dis-
ırge of the soldier was, as a matter of comity, conceded.

5. Hough, 141; Simmons § 180; G. O. 10, 52, Dept. of the Platte,
71; G. C. M. O. 174, Dept. of the East, 1871; Do. 29, Dept. of Cal.,
72.

Finding. The authority of a court-martial, under t lished usage of our service, to find not guilty of the charged, where the requisite *animus* is not proved, but *absence without leave*, has been remarked upon in a Chapter.[1] The finding, under a charge of desertion, o *to desert*, is expressly authorized in the British law,[2] an is considered, properly be sanctioned in our service.[3]

Punishment.[4] The Article leaves the punishment t cretion of the court. In our army at present the usual for desertion is—dishonorable discharge, forfeiture of all allowances, (a penalty in great measure unnecessary b of the forfeitures incurred by operation of law,[5]) and con at hard labor in a military prison for from two to five yea duration of the term of confinement is commonly meas the presence or absence of such circumstances as that the has similarly offended on a previous occasion or occasion in deserting, he abandoned an important duty—as that of or guard over prisoners, or committed some such criminal as larceny or embezzlement of public property or a viol Art. 17; that he induced others to desert with him, or suaded by others—his superiors or seniors—to desert; was a recruit, or an experienced soldier or non-commi officer;[6] that he was apprehended or that he surrendere self; or by any other circumstance illustrating the origina inality, subsequent intentions, &c., of the party, and t either to dispose the court unfavorably or to render it leni

In time of war, when the offence is made *capital—i. e.* p

1. Ch. XIX.

2. Army Act, s. 56. (3.)

3. It has been so sanctioned in a naval case. Dynes *v.* Hoo Howard, 65. And see Bankhead *v.* U. S., 20 Ct. Cl. 405.

4. See Chapter XX—"SENTENCE AND PUNISHMENT."

5. See *post.*

6. That a recruit is in general to be less severely, and a non-c sioned officer more severely, punished, upon conviction of dese see G. C. M. O. 174, Dept. of the East, 1871; Do. 47, 140, Id., 18 47, Id., 1873; G. O. 71, Dept. of the South, 1874.

7. In a case in G. O. 24, Div. of the Pacific, 1868, the court i a lenient punishment "on account of the condition of the accuse foot and lower leg are rendered useless by frost bite, which o during the period of his unauthorized absence."

e capitally—by the Article, desertion is visited with especial erity.[1] Desertion to the enemy is almost invariably punished h death; and this penalty has also not unfrequently been enced in cases where the party has enlisted solely with the view obtaining a bounty and then abandoning the service.[2]

Legal Consequences of Desertion. Irrespectively and inendently of the *punishments* which are or may be awarded by ourt-martial upon conviction of desertion, there are certain al consequences resulting from the commission of this offence which some notice is desirable to a completion of the present ject. These consequences, which do not require to be exssed in the sentence, but which result *by operation of law* upon ue ascertainment of the *fact* of desertion, are as follows:—

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1. In a Resolution of Congress of June 20, 1777, (2 Jour. Cong., 173,) s declared that when the desertion is *to the enemy*, "the offence benes doubly heinous and wicked, the person committing it being guilty both perjury and treason." In Circ., Twenty-fourth Army Corps, arch 21, 1865, the Dept. Commander announces—"I will give one ndred dollars reward and three months' leave or furlough, to any offir or soldier who shoots, or brings in, a deserter going to the enemy." To a similar effect see G. O. 136, Eighteenth Army Corps, 1864. And e, generally, Leiber's Instructions, G. O. 100 of 1863 § 48.

2. In the case of James Devlin, *alias* Pat Diamond, *alias* Frank Tully, bstitute,—one of the most conspicuous of the class of professional deters, known in the late war as "*bounty-jumpers*,"—published in G. 9, Dept. of the East, 1865, Gen. Dix, in approving the death sentence, d ordering it to be presently executed, adds as follows:—"The Majorneral Commanding is thus prompt in the execution of the sentence nounced upon the accused, on account of the aggravated circumnces of the case. Within the period of eight months he enlisted twice he Army, and once in the Navy, having twice during the same period, erted the flag of his country. His case is one of those in which bad n, tempted by enormous bounties, enlist into the service for the sake making money, with the deliberate purpose of deserting, and in which profit is proportioned to the number of successful repetitions of the me. By common consent, these infamous men are designated by the ressive appellation of bounty-jumpers. They might more properly ermed traitors and public plunderers, and the Major-General Comding, in approving the sentence of death pronounced by the Court, ns it his duty to the Army and the Country to announce, that, in all cases, he will cause the punishment awarded, to a crime subversive very principle of moral and political obligation, to be executed with utmost inflexibility and promptness." And see remarks, to a similar t, of the same commander, in G. O. 28, Dept. of the East, 1864; also of Downing *alias* Ball, cited under "Fiftieth Article," *post*.

Forfeiture of pay and allowances. By pars. 1 2458,[2] Army Regulations, it is declared in substance th serters shall forfeit all pay and allowances due them at of their desertion, as well as all accruing during the peri authorized absence.[3] This is a forfeiture quite other t imposable as a punishment by court-martial, resulting simply by operation of law from the violation of the co enlistment or obligation of service.[4] It is not essenti taking effect that there should have been any convictic offender;[5] but as a conviction is the most satisfactory ascertaining the fact of desertion, this forfeiture, (except where the deserter is restored to duty without trial un 218 of the Regulations,) is rarely enforced in the abse conviction.[6] It includes, with the pay proper, all the p emoluments due the deserting soldier or officer,[7] except o as may accrue *after* the interval specified in the Regulatic is to say after the return of the party from desertion an he is awaiting trial and the action on his case of the re authority. It is in general only the amounts due for tl indicated period that are actually affected by the penalty feiture commonly contained in the *sentence.*[8]

Besides the pay forfeited under the Regulations above mer a deserter, remaining in the service, forfeits also his "r *pay;*" the same being, by the terms of Sec. 1281, Rev. St

1. As amended by G. O. 68 of 1883. This paragraph incl absentees without authority, whether or not deserters.

2. Amended by G. O. 52 of 1884.

3. A corresponding forfeiture of wages is incurred by deser men at maritime law. Curtis, Rights and Duties of Merchant 130, 303, 305, 306.

4. DIGEST, 225, 270, 364. And see U. S. *v.* Landers, 92 U XIII Opins. At. Gen., 199.

5. See authorities cited in last note.

6. DIGEST, 225. It cannot of course be enforced if the ac acquitted; nor, upon a conviction, if the finding is *disapproved* competent authority. DIGEST, 225, 436. And see XIII Opins. A 459; Circ. 12 of 1883; Do. 2 of 1885.

7. *Bounty* has been held to be included in the term "allow U. S. *v.* Landers, *ante;* XIII Opins. At. Gen., 188. But the f would not affect amounts already paid to the party, and in his po or held in trust for his benefit by the military authorities. DIGE 369; XIII Opins. At. Gen., 210, 257.

8. DIGEST, 365. And see U. S. *v.* Landers, *ante.*

: only in case the soldier serves "honestly and faithfully" to date of his discharge.

orfeiture of savings. The Act of May 15, 1872, incor-ıted in Sec. 1305 of the Revised Statutes, in providing for the ɔsit, by soldiers, of their savings with the Pay department of army, to be returned with interest upon discharge, declares that amount deposited "*shall not be liable to forfeiture by sentence urt-martial, but shall be forfeited by desertion.*" In the opin-of the author, this forfeiture takes effect, by operation of law, n ascertainment of the fact of desertion, similarly as does the eiture last considered; a conviction being the preferable, ıgh not an essential, form of such ascertainment.

he obligation to make good the time lost to the United tes. This liability forms the subject, in part, of the succeed-Article, (Art. 48,) and will be reserved for consideration there-er.

he loss of citizenship and disqualification for office. . 21 of the Act of March 3, 1865, c. 79,[1] in providing that per-s then occupying the status of deserters from the military or al service, who should not return to the service within sixty s from a specified date, should, "*in addition to the other law-penalties of the crime of desertion, be deemed and taken to have ntarily relinquished and forfeited their rights of citizenship and r rights to become citizens, and * * * be forever incapable olding any office of trust or profit under the United States,*"—ceeded to add the general provision that "*all persons who shall eafter desert the military or naval service * * * shall be le to the penalties of this section.*" This general enactment subsequently incorporated in the Revised Statutes as Sec. 8,[2] and continues to be law.

'his statute has been construed by the courts of several of the tes, and it has invariably been held that the forfeiture de-ed was a penal consequence of desertion, and could be in-

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Compare the provision of the Act of April 14, 1802, s. 4, by which ons "convicted of having joined the army of Great Britain during ate war" are rendered ineligible to citizenship.

It had meanwhile been recognized as a continuing general provision m enactment of July 19, 1867, excepting certain persons from its ation. (Sec. 1997, Rev. Sts.)

curred only upon a *conviction* of t
alone has jurisdiction of the sam
therefore been ruled that, to estab
an incapacity resulting from the
the rights of citizenship,—as for
ercise the right of suffrage,—it is
of his conviction, (*i. e.* of a convi
duced and proved.[1]

The penalties prescribed by the
specifically included in the *sente*
are not so included in practice.

It has been held by the Attorne
is empowered to "*pardon* a deserte
that is to say that a pardon will op
attaching as continuing penalties

It may be added in regard to th
in its terms, it was manifestly int
the draft and of preventing deser
and public danger. It was thus i
general clause was apparently ad
as might remain of the then exis
however, to such period, it has be
eration. In a normal condition o
tional character, by which desertic
punishment,[4] is incongruous and
in our military law is no longer de

Ineligibility to reappointm
vised Statutes, "*the President is a*
of the army, for desertion, any offic

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1. See Huber *v.* Reily, 53 Pa. St.
N. Y. 420, (also 58 Barb. 152 and 5
Maine, 148; Holt *v.* Holt, 59 Id. 464;
And compare Kurtz *v.* Moffitt & Fiel
1885, (GRAY J.) Such a conviction w
vote under the laws of a *State*, unless
voter in the State shall be a citizen o
have in fact adopted the penalty in qu
v. Matthewson, State *v.* Symonds.

2. See in this connection State *v.* D

3. XIV Opins., 124.

4. Compare McCafferty *v.* Guyer, 5

nths without leave;" and it is added—"*and no officer so dropped ll be eligible for reappointment.*"[1]

Ineligibility for re-enlistment. Sec. 1116, Rev. Sts., in ich it is declared that deserters shall not be eligible for enlistnt, has already been considered in treating of the Third Article.

Qualified ineligibility to admission to the Soldiers' me. By Sec. 4822, Rev. Sts., it is provided that no one "*who been a deserter*" shall be received into this Institution, "*with such evidence of subsequent service, good conduct, and reformaof character, as is satisfactory to the Commissioners.*"

Incapacity to receive a bounty-land warrant. In Sec. 8, Rev. Sts., it is provided that—"*No person who has been in military service of the United States shall, in any case, receive ounty-land warrant, if it appears by the muster-rolls of his regent or corps that he deserted or was dishonorably discharged from vice.*"

Reward for Arrest of Deserters. By par. 214, Army Regtions, a "*reward of thirty dollars*" is declared to be payable the arrest and delivery of a deserter to a proper officer as rein further specified.

The arrest of a deserter will in general properly be made by a litary officer, soldier or employee.[2] He will act by virtue of military authority and orders, and will not, of course, require *warrant.*[3] The right, however, to arrest a deserter will not au-

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1. As to this provision, see under "Ninety-Ninth Article," *post.*

2. "A police officer of a State, or a private citizen, has no authority such, without any warrant or military order, to arrest and detain a serter from the Army of the United States." Kurtz *v.* Moffitt & elds, U. S. Supreme Court, Nov. 23, 1885, (GRAY, J.,) overruling gment of Superior Ct., San Francisco, published in G. O. 7, Div. of Pacific, June 4, 1885.

The Secretary of War, referring, in his Annual Report, of December, 85, to the decision of the Supreme Court in this case, observes—"I called upon to suggest that a statute be enacted applying the comon law rule to deserters, authorizing their arrest, as in cases of felony, private citizens or police officers for the purpose of surrendering them the proper authorities for trial."

3. See Hutchings *v.* Van Bokkelen, 34 Maine, 126; Hickey *v.* Huse, Id. 493. Compare the provision of the British Army Act, 154.

That a deserter arrested at a place not conveniently near a military tion may be temporarily confined in the local jail, is illustrated in

thorize the arresting party to violate the vested rights of third persons. Thus it will not authorize forcing an entrance into a private house against the consent of the occupant, for the purpose of apprehending a deserter concealed therein.[1] In such a case the arrest may sometimes be effected by taking out a warrant against the occupant for the offence of harboring a deserter, made punishable by Sec. 5455, Rev. Sts.

The reward for the arrest of deserters has, in practice, been paid not only to non-commissioned officers and private soldiers,[2] but also to peace officers and other civilians.[3] Legally, however, it can only be paid to one legally authorized to make such an arrest. In view of the provision of Sec. 1269, Rev. Sts., the reward cannot legally be paid to a commissioned *officer* of the army.

If a reward has been paid before the alleged deserter is brought to trial, and upon trial he is *convicted*, the amount of the reward is stopped against his pay:[4] such stoppage, however, cannot be made where he is acquitted,[5] nor where he is found guilty of the minor offence of absence without leave.[6] Nor, though he be convicted, can the stoppage be made, if such conviction is *disap-*

Hutchings *v.* Van Bokkelen, *ante.* That the officer or person arresting a deserter is not authorized to seize private property belonging to him, see Clark *v.* Cummins, 47 Ills. 372.

1. Clay *v.* U. S., Devereux, (Ct. of Cl.,) 25. The ruling, *contra*, announced in Circ. 6 of July 10, 1885, is believed to have been inadvertently approved and published.

2. See Circ. 8 of 1883.

3. Circ. 7 of 1885.

4. Par. 215, Army Regulations; G. O. 137 of 1884.

5. DIGEST, 227. This principle is now recognized in par. 216, A. R.

6. The ruling of the Judge Advocate General to this effect, (DIGEST, 227–8,) was concurred in by the Attorney General, XVI Opins., 474. And, to a similar effect, see Circ., Dept. of Va., March 31, 1870, where the stoppage, the conviction having been of absence without leave only, was declared by the General of the Army to be "unlawful," and it was added—"If this amount has been deducted from the soldier's pay, he should be re-mustered therefor on the next pay roll of the company." See also Circ., Dept. of the Mo., June 9, 1871. In G. O. 48, 53, Dept. of the Mo., 1866; Do. 23, Dept. of La., 1868, a forfeiture of the thirty dollars paid as reward, imposed by the court as a penalty in the sentence of a soldier convicted only of the lesser offence, was disapproved or remitted. And see the recent Circ. 6 of 1883. It need hardly be remarked that the liability for the amount of the reward is not *punishment*, nor properly included in the *sentence*. DIGEST, 227.

ved by the competent reviewing authority, and thus nullified aw.[1]

FORTY-EIGHTH ARTICLE.

'revious Legislation. This provision first appears as an icle of war in the code of 1874. Previously it had existed ı section of the successive Acts of May 30, 1796, c. 39, March 1802, c. 9, January 11, 1812, c. 14, and January 29, 1813, c. 16. ɜ only material change that need be remarked in its language hat the words—"in addition to the penalties mentioned in rules and articles of war," formerly inserted after the word ıall" in the second line, have been omitted in the present n, as apparently no longer necessary.

'he Subjects of the Article. The Article comprises two :inct subjects:—1. The liability of the deserter to complete, 'make good," the term of his contract; 2. The amenability :he deserter to trial after the period for which he enlisted has ›ired.

. The Liability of the Deserter to Complete his Con-ct—*When it takes effect.* That this liability becomes ɪrative only upon a *conviction* of the deserter may now be con-ɜred as settled. The indication expressed in the earlier forms the statute—"*in addition to the penalties*," &c., though now itted, is, it is believed, to be considered as still understood; same construction being accordingly given to the Article as ;iven to the provision, in which is expressed a similar indica-ı,[2] of the statute depriving deserters of the right of citizen-p, which has been uniformly interpreted as taking effect only on a conviction by court-martial.[3] A similar view has appar-ly been adopted by the Attorney General, who, in treating of : penalties incurred by deserters, holds of the provision in estion of Art. 48 that it "is to be construed along with the ıer penal provisions relating to the offence of desertion, all of

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- DIGEST, 227, 436. Otherwise if he be restored to duty without l. Circ. 4 of 1884.

- By the words—"in addition to the other lawful penalties of the ne of desertion." Act of March 3, 1865, c. 79, s. 21.

. See Huber *v.* Reily, 53 Pa. St. 112, and other authorities to the .e effect cited under the "Forty-Seventh Article."

which contemplate a trial and conviction before the infl of the penalty. * * * It comes into play only after viction."[1] A similar understanding of the law is convey par. 220[2] of the present Army Regulations, which direct enlisted men absenting themselves without authority "shall *conviction by court-martial*, make good the time lost by su sence."[3]

The conviction, to authorize the enforcement of the lial must of course be duly *approved*. If *disapproved*, all liabili account of the alleged desertion is put an end to, in the manner as if there had been an acquittal by the court.[4]

Not to be expressed in the sentence. Though once sidered otherwise,[5] it is clear that the liability in question, at ing as it does by operation of law upon conviction, is quite pendent of the *punishment* that may be adjudged by the c and need not therefore be included in the sentence.[6] In pra it is now most rarely thus expressed. On the other hand, w ever be the terms of the sentence, it cannot affect the attac of the liability.[7] Any reference to it in the sentence is surplusage.

Period of time to be made good. This period is tha the time intervening between the day on which the unauth ized absence commenced and that of the arrest, return, or render of the soldier. Time passed by him in arrest or confi

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1. XV Opins. At. Gen., 162.

2. Amended by G. O. 68 of 1883.

3. It may well be questioned whether this regulation, in extending penalty to a class other than that specified in the statute—deserters, d not assume to legislate and is not therefore without legal sanction.

That the penalty cannot be enforced against soldiers who have l time of service by reason of having been confined, (when not abs without leave,) by the civil authorities—see Circ. 5 of 1883.

4. DIGEST, 22; XIII Opins. At. Gen., 459.

5. See G. O. 26, 45, of 1843.

6. DIGEST, 22; G. C. M. O. 329 of 1864; G. O. 94, Dept. of the M 1867; Do. 23, Dept. of the Lakes, 1873; G. C. M. O. 74, Dept. of East, 1873.

7. Thus where a deserter was sentenced to imprisonment "for t balance of his term," his liability to make good the time lost was h not to be affected, the word "term" evidently referring to the per of his enlistment as computed from its initiation. DIGEST, 22.

ment or in hospital, while awaiting his trial or the disposition of his case by the reviewing authority, cannot be computed as a part of such period;[1] nor can time passed in confinement (without discharge) under his sentence be credited to him thereon, such time being not service but punishment.[2] So, the entirety of the period cannot be affected by the fact that pending his confinement under the sentence, the term of his enlistment, (dating from its inception,) may have expired.[3]

The liability dissolved by discharge. Where, however, the deserter is sentenced to be dishonorably discharged, and has been duly discharged accordingly, he is finally separated from the military service under his enlistment and cannot legally be remanded to the same to make good the time of his absence. And herein is the reason why this liability is so rarely enforced in practice, *viz.* because deserters, upon conviction, are now almost invariably sentenced to be dishonorably discharged prior to confinement.

So, where a deserter, in the absence of a trial and sentence, or pending the execution of a sentence which did not impose discharge, is discharged as an executive act under Art. 4, he cannot be subjected to the liability in question, the Government having, by thus discharging him, *waived* the enforcement of the same.[4]

Status of soldier when making good his time. It is declared by par. 217, Army Regulations, that a deserter, when returned to the proper command to make good the time due by him to the United States, "will be considered as again in service." While thus serving he will occupy in his military relations the same status as that of any soldier in good standing, except in so far as his rights to pay or allowances may have been forfeited by a forfeiture of pay, &c., "to become due," contained in his sentence. Otherwise he is to be paid, subsisted, &c., as well as treated in general, like any other soldier. He is not in arrest, and is not to be discriminated against because of having

1. DIGEST, 22.
2. DIGEST, 22.
3. DIGEST, 22–3.
4. The law on this subject is recognized in par. 217, Army Regulations, which declares that deserters shall make good time lost, &c., "unless discharged by competent authority."

been a deserter. His discharge at the end of his servic an honorable one in law, though it may properly state th stances under which it is given.

2. The Amenability of the Deserter to Trial a period for which he enlisted has expired. Th in its second clause, in effect provides that a deserter, th arrested till after his term of enlistment has expired amenable to trial and punishment in the same manner a same extent as if apprehended before its expiration. Su ability may of course be terminated by a *discharge* giver petent authority,[1] and, as indicated in a previous Chapt subject to the limitation as to the initiation of prosecu joined by the 103d Article.

FORTY-NINTH ARTICLE.

Origin of the Provision. This statute first appea Article of war in the present revised code of 1874, hav viously formed the second section of the Act of Aug. 5, 54. It is understood to have originated in the fact tha officers of the army, intending to join the Southern conf had, prior to the date of the Act, tendered their resignati without waiting for their acceptance, departed for their re States.

The Article Declaratory of the Existing La Article is simply a definition of desertion as illustrated b ticular class of cases. An officer of the army by merely r his commission modifies in no manner his amenabilit military law and jurisdiction. This remains unchanged has been officially notified of the acceptance of the resign tendered.[3] If prior to such notification he assumes to a the service, he is a deserter under the military common special statute declaring him such being required. Th 49 merely designates a certain class of officers as deserte

1. DIGEST, 23.

2. See Chapter XVI.

3. DIGEST, 430. And see Barger *v.* U. S., 6 Ct. Cl. 35; al mack's case cited in next note.

thout it, would still be amenable to justice as such under the neral provision of Art. 47.

The Article may further be viewed as declaratory, by implica-n, of a principle of the law governing *resignations*, *viz.* that ıen an officer has in fact been duly notified of the acceptance a resignation tendered to take effect immediately or on a cer-n day, he is entitled at once or on that date to quit his post d duties, and separate himself, as a civilian, altogether from : military service; and, moreover, that thereafter no reconsid-ıtion or attempted withdrawal of the acceptance by the author-es can remit him to his former status, render him amenable to litary law, or be otherwise than wholly futile.[1]

FIFTIETH ARTICLE.

The Subjects of the Article. This Article, which dates om the code of 1776, relates to two different matters:—1. The t of re-enlisting without a regular discharge; 2. The duty and ıbility of officers in regard to persons so re-enlisting.

Re-enlisting without a Regular Discharge. Art. 4, as s been seen, prescribes in what manner and form a soldier shall : discharged, and the present Article in effect declares that a ldier who assumes to discharge *himself* from his proper regi-ent, &c., and enlist in another, does so at the peril of being ated as a deserter.[2] It is to be construed, however, not as ating an offence distinct from the desertion made punishable Art. 47, but as indicating a specific form of such offence, or her as declaring that the act of re-enlisting under the circum-nces described shall constitute *proof of desertion* on the part of soldier.[3] The object of the provision evidently was to pre-de the notion that a soldier could be relieved from liability as eserter because, on abandoning his regiment, he proceeded to enter the service in another, or, in other words, that he could

- DIGEST, 430; Mimmack *v.* U. S., reported in 10 Ct. Cl. 584, 97 U. 26, XII Opins. At. Gen. 555, and XIV Id. 262.

- It has been noticed by the Judge Advocate General, (DIGEST, 24,) t this Article does not apply to a case of a naval *seaman* or *marine* sting in the army without a discharge from his former service.

- See DIGEST, 23–4; G. C. M. O. 129, Dept. of the Mo., 1872; Do. Id., 1874; Do. 4, Id., 1883.

be excused from repudiating his pending contract by substit another in its place.[1]

Punishment. The provision, in regard to punishme Art. 47 applies of course to the form of desertion specifi *this* Article, which is therefore punishable with death in ti war,[2] and with any lesser penalty or penalties in time of While *any* re-enlistment in violation of the Article is a spec fraud upon the United States, the offence will be aggravate the punishment properly made more severe where the par re-enlisting, uses an assumed name, makes false statement hibits a false or forged discharge, &c., with deliberate int deceive the military authorities.[3]

Duty and Liability of Officers under the Article. object of the second provision of the Article was, accordi Samuel,[4] "to counteract the interest," which officers might s times have, to fill up with improper persons the quotas of organizations, with a view to obtaining the increased ran other advantage attaching to the command of a certain nu of men. A further purpose of the provision, in our law, w seem to be to deter officers from becoming, through conniv or indifference, practically accessories to desertion,[5] and thus to render more certain the detection and punishment of the serters themselves.

The term "*receive and entertain*" would include not only harboring or relieving of the class of deserters specified, or

1. Samuel, 330.

2. The death sentence was on several occasions during the late w adjudged upon a conviction of desertion under this article. See cas in G. O. 30, 35, of 1864; G. O. 83, Dept. of Washington, 1864.

3. Especially where the purpose is to secure bounty money or othe emolument. In the case of Downing *alias* Ball, published in G. O. 8 Dept. of Washington, 1864, the accused, a "bounty-jumper," was con victed of seventeen separate re-enlistments, as a substitute, entered int during a period of less than a year, and in six different States, and upo which he was found to have received in all nearly eight thousand dol lars in bounties. The sentence of death was approved and execute in this case.

4. Page 332. And see O'Brien, 98. Hough, (p. 163,) appears to b of opinion that *recruiting* officers are mainly intended by the Artic Its terms however are general and equally applicable to all officers.

5. See O'Brien, 98.

sting them to evade justice,[1] but the admitting of them to the ımand, or recognizing and treating them, as soldiers in good ıding.[2] In a charge against an officer under this Article, the *nter*, or that he acted "knowingly," must be expressly alleged . proved.

'he purpose, observes Hough,[3] of requiring the deserter to be nediately confined is to prevent the escape which he would be :ly to attempt upon perceiving himself to be the object of sus- .on. Such confinement would also properly be resorted to with view of promptly bringing him to trial. The term "imme- :ely," as applied especially to the giving of "notice," is to be strued as meaning with all reasonable dispatch.[4]

'he severe and mandatory *punishment* of cashiering, prescribed :his part of the Article, is evidently an expression of the uni- n policy of the law to visit with extreme penalties the entire s of acts which either involve, induce, or encourage desertion.[5]

FIFTY-FIRST ARTICLE.

'he Offences Contemplated. This Article, which dates n the code of 1775,[6] is viewed as making punishable two dis- ſt acts—that of counselling the commission of the crime of ertion, and that of inducing, by persuasion, such crime to be ımitted.[7]

. In a case in G. O. 79, Army of the Potomac, 1862, a captain was victed of a violation of this Article in that he "did wilfully harbor conceal" a deserter from another regiment, and did "neglect and se to surrender him on the demand of" his company commander.

See cases in G. O. 49, Dept. of Washington, 1864; Do. 1, Dept. of Va., 1864.

Page 164.

See Samuel, 332; O'Brien, 99.

Compare Sec. 5455, Rev. Sts., which makes punishable by fine or isonment, to be imposed by a U. S. court, any person who shall entice, ure, or assist a soldier to desert, or knowingly harbor, protect, con- or refuse to give up, a deserter.

Neither this code nor that of 1776 made these offences capitally shable.

"There is this difference between having *advised* and having per- led to desert, that the one is an advice to another to do an act, :h he may or may not consent to commit; the other a persuasion by :h the act is *done*." Hough, 172. *Contra*, Samuel, (p. 339,) who, ısual, is repeated by O'Brien, (p. 99,) views the word "persuades"

Advising to Desert. The offence is complete with ing of the advice with serious intent.[1] Whether the ac not induced by the advice given is quite immaterial.

Persuading to Desert. But to persuade a person t is to cause him to do so by the influence employed.[2] Th of persuading is not therefore complete unless the party p actually proceeds to consummate the crime. Persuadin sert is thus in the nature of the offence of an accessory be fact to a felony. The persuasion may be by solicitation ment, promise of reward, or other form of inducement br bear for the purpose.[3]

In perhaps a majority of the cases, (which however numerous,) this offence has been committed by one who contemplated desertion, and who did in fact desert, acco by the party persuaded.[4]

A peculiarly aggravated form of the offence would be p by a case where an officer enticed men to desert from the ment in order that he might enlist them in his own con

To constitute the offence it is not essential that the should have been alone in the persuasion. If he is clearl to have promoted the result, to have been instrumental wi persons or agencies in bringing it about, he may equally victed as if he had been the sole cause.[6] So it is not n

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as substantially synonymous with "advises," and so regards th as contemplating but a single offence. The construction, how the Article by Hough is more natural and reasonable, and is s by the etymology of the word *persuade*. It is further supporte ruling in the parallel case of Respublica *v.* Roberts, 1 Dallas, 3 the court held that the term "persuade to enlist" in a statute, m vise with success—induce to actually enlist; citing Regina *v.* Ld. Raym. 889. And see DIGEST, 24, and the G. O. cited *pos*

1. It has been held by the Judge Advocate General, (DIGE that a mere "declaration made by one soldier to another of a wil to desert with him in case he should decide to desert, was not an *advising* to desert in the sense of this Article."

2. See note *ante*.

3. See Samuel, 343; Hough, 172; O'Brien, 99

4. Such cases occur in G. O. 23, Dept. of the Mo., 1863; G. 11, 152, Id., 1868.

5. See this *charged*—the officer was acquitted—in G. O. 1, W. Va., 1864.

6. Compare case of Grant *v.* Gould, as commented upon in

ıe persuasion should have been personal: if employed, for ce, by an officer, through a non-commissioned officer or r, it will be within the Article.[1]

: desertion persuaded to be committed may be either of the ıry form or that particularized in Art. 50. The latter was ırm charged in the well-known English case of Sergeant .[2]

nishment. This being discretionary, a court will ordina- ε inclined to visit the latter form of offence more severely he former; the fact that the desertion was actually induced to indicate a more persistent and criminal purpose than naturally be inferred where its commission, though ad- was not brought about. The offence charged should also ε more severely punished in proportion to the rank and ɔn of the offender. For one to advise or persuade desertion higher rank or office gives a peculiar force and significance words and acts, and from whom a good example and a ıl enforcement of discipline are properly to be expected, is ırse a much graver dereliction than a similar offence com- l by one of the same military grade with the person at- ed to be influenced.[3] In any case, the persuader, if of or rank, will be deserving of a severer punishment than ırty persuaded.

XI. THE FIFTY-SECOND AND FIFTY-THIRD ARTICLES.

ENDANCE AND BEHAVIOUR AT RELIGIOUS SERVICES—PROFANITY.]

RT. 52. *It is earnestly recommended to all officers and soldiers ntly to attend divine service. Any officer who behaves inde- or irreverently at any place of divine worship shall be brought*

And see the cases in G. C. M. O. 152, Dept. of the Mo., 1868, ɔrporal, an artificer, and a private of the same company, who arged each with persuading the two others to desert; the two being convicted.

uch was the form of the offence in a case in G. O. 40, Dept. of ngton, 1865.

ırant *v.* Gould, 2 H. Bl. 69.

ı the case, above cited, in G. O. 23, Dept. of th

before a general court-martial, there to be publicly and sever reprimanded by the president thereof. Any soldier who so offe shall, for his first offence, forfeit one sixth of a dollar; for e further offence he shall forfeit a like sum, and shall be confi twenty-four hours. The money so forfeited shall be deducted fr his next pay, and shall be applied, by the captain or senior off of his troop, battery, or company, to the use of the sick sold of the same.

"ART. 53. *Any officer who uses any profane oath or execrat shall, for each offence, forfeit and pay one dollar. Any soldier w so offends shall incur the penalties provided in the preceding arti and all moneys forfeited for such offences shall be applied as ther provided.*"

FIFTY-SECOND ARTICLE.

Origin. The originals of this and the succeeding Article Arts. 2 and 3 of 1775—may be traced to British articles of a ve early date; corresponding provisions being found in the "Law and Ordinances of Warre" for the royal army, of 1639,[1] in t Articles for the Scottish army, of 1644,[2] and in Art. I of the Co of James II.[3]

The Recommendation. The Article, in its first clause, d fers from the corresponding British article,[4] from which it w directly derived and which *requires* attendance at divine worshi in *recommending* only such attendance;[5] a difference doubtle growing out of the provision in our Constitution,[6] by which Co gress is forbidden to make any "law respecting an establishme of religion or prohibiting the free exercise thereof."[7] A statu

death penalty, (commuted by the reviewing authority to imprisonment was adjudged a corporal convicted of having persuaded a private desert with him.

1. 1 Clode, M. F., 429.

2. Pipon & Col., 16.

3. See Appendix. And compare Arts. 5 to 16 of Gustavus Adolphu

4. Art. 1, Sec. 1, of 1765. See Appendix.

5. Similarly "it is commended," in G. O. 7, Army of the Potoma 1861, "to commanding officers that the men shall attend divine servi after the customary Sunday morning inspection."

6. Art. 1 of the Amendments.

7. A pointed cotemporary exposition or illustration of this provisi of the Constitution is found in the declaration inserted in the Trea

making it obligatory upon officers or soldiers to attend religious services on Sunday (or other day) would be of doubtful constitutionality as opposed to the spirit if not to the letter of the organic law. The Article, therefore, while favoring such attendance, has well left it optional with officers and soldiers whether they will or not be present at any such services.

The Penal Provision. The awkward and exceptional procedure prescribed by this Article would be sufficient to preclude, at this date, a resort to it for the disposition of offenders.[1] For the punishment indeed of an offence such as indicated, a prosecution under Art. 62 or 61, would in general be found entirely adequate and effectual. The Article is thus practically as unnecessary as it is clumsy and antiquated, and having now no material value or significance, might well be dropped from the code.[2]

FIFTY-THIRD ARTICLE.

Its Former Significance. The enforcement of this Article, (which is derived from provisions of the Codes of Charles I and James II,[3]) was, at an early period of our law, much insisted upon. Thus, in a Resolution of December, 1776,[4] recommending to the States the appointing of a day of "fasting and humiliation," it is added:—"The Congress do also, in the most earnest manner, recommend to all the members of the United States, and particularly the officers civil and military under them, the exercise of repentance and reformation; and further require of them the strict observation of the Articles of war, and particularly that part of the said Articles which forbids profane swearing," &c. Again, in February, 1777,—"It being," (to quote from the Jour-

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with Tripoli of 1796–7, (VIII Stats. at Large, 155,) and still in operation, (see Public Treaties, 756,) that—"the Government of the United States of America is not in any sense founded on the Christian religion," and "has in itself no character of enmity against the laws, religion or tranquillity of Mussulmen."

1. As to the inconvenience of this procedure, see Hough, 56; Id., (P.) 28; McNaghten, 84; O'Brien, 58.

2. NcNaghten, (writing in 1828,) refers, (p. 84,) to the corresponding provision of the British Articles as "a mere dead letter."

3. See Appendix. And compare Arts. 2, 3 and 4, of Gustavus Adolphus.

4. 1 Jour. Cong., 577.

nals,[1]) represented to Congress that profaneness in general, a particularly cursing and swearing, shamefully prevail in the ar of the United States," it is "Resolved that General Washing be informed of this, and that he be requested to take the n proper measures, in concert with his general officers, for refo ing this abuse." And, in a subsequent Resolution of Octol 1778,[2] officers of the army are "strictly enjoined" to see, am other things, "that the good and wholesome rules provided the discountenancing of prophaneness * * * are duly punctually observed."

Present Unimportance. The extent, however, of the of profane language in the army has long ceased to be regar as a matter of public concern. The vehement and copious p fanity of an earlier period is indeed now rarely indulged in. practice, such language, where so employed as to amount t *disrespect* or a *disorder*, is made the subject of a charge under 62d or other appropriate Article, but otherwise does not in g eral receive official notice. The 53d Article is never enfor and is practically obsolete: its provisions need not therefore further considered.

XXII. THE FIFTY-FOURTH, FIFTY-FIFTH, FIFT SIXTH AND FIFTY-SEVENTH ARTICLES.

[PROTECTION TO CITIZENS AND THEIR PROPERTY, &c.]

"ART. 54. *Every officer commanding in quarters, garrison, on the march, shall keep good order, and, to the utmost of his pow redress all abuses or disorders which may be committed by any o cer or soldier under his command; and if, upon complaint made him of officers or soldiers beating or otherwise ill-treating a person, disturbing fairs or markets, or committing any kind of ri to the disquieting of the citizens of the United States, he refuses omits to see justice done to the offender, and reparation made to t party injured, so far as part of the offender's pay shall go towa such reparation, he shall be dismissed from the service, or otherw punished, as a court-martial may direct.*

1. 2 Jour. Cong., 51.
2. 3 Jour. Cong., 85.

"ART. 55. *All officers and soldiers are to behave themselves orderly in quarters and on the march; and whoever commits any waste or spoil, either in walks or trees, parks, warrens, fish-ponds, houses, gardens, grain-fields, inclosures, or meadows, or maliciously destroys any property whatsoever belonging to inhabitants of the United States, (unless by order of a general officer commanding a separate army in the field,) shall, besides such penalties as he may be liable to by law, be punished as a court-martial may direct.*

"ART 56. *Any officer or soldier who does violence to any person bringing provisions or other necessaries to the camp, garrison, or quarters of the forces of the United States in foreign parts, shall suffer death, or such other punishment as a court-martial may direct.*

"ART. 57. *Whosoever, belonging to the armies of the United States in foreign parts, or at any place within the United States or their Territories during rebellion against the supreme authority of the United States, forces a safeguard, shall suffer death.*"

FIFTY-FOURTH ARTICLE.

Its Object. This statute, which, taken from a previous British article, dates in our law from 1775, was evidently designed to protect civilians[1] from disorderly and riotous[2] acts on the part of the military, and, while providing for the punishment of the latter, to secure to the former an indemnification for such injuries as they may have suffered.

Construction. The Article, however, is, as a remedial provision, incomplete and unsatisfactory, especially in that (1) it leaves in doubt what classes of injuries are had in view—whether injuries to the person only, or injuries to property as well as person; and (2) fails to indicate in what manner and by what instrumentality the reparation for such injuries is to be effectuated.

As to the injuries contemplated, the language of the Article would rather imply that it was bodily assault only that was in-

1. That the Article contemplates only injuries done to this class, see Samuel, 465; O'Brien, 117; DIGEST, 25. Our Article is in effect the corresponding provision of the British code,—which applied only to cases of injury done to landlords or other persons with whom soldiers were billeted,—extended to citizens in general.

2. The expression "any kind of riot," employed in the Article, may be regarded as of more general import than the technical legal term *riot.*

tended. But as the species of disorderly conduct specified are such as naturally to result in damage to property, such damage, at least when incidental to violence against the person or the outgrowth of a breach of the peace, might well be regarded as within the spirit of the Article. There was support therefore for the practice which grew up during the recent war, and was sanctioned later by the War Department in the General Order presently to be cited, of summarily mulcting soldiers by stoppage of their pay, under the present Article, for damage done civilians in their *property*, (in violation of Art. 55 or otherwise;) nor was this damage always the accompaniment of a personal assault or of a riotous outbreak. A liberal construction thus came to be given in practice to the Article in the particular in question, and, though in some instances this practice was extended to cases quite beyond the proper scope of the statute,[1] a prompt justice, within the equity of its provisions and suited to the exigencies of the times, was in most cases administered.

As to the modus operandi of the reparation, the Article does not indicate whether the appropriation of pay is to be made directly by the order of the commander himself or through the instrumentality of a court-martial. Early in the late war, however, the construction was put upon it by the Judge Advocate General[2] that it *authorized* the making of the reparation through the summary action and order of the military commander, independently of any proceedings before a court-martial, and this view of the law was in general concurred in by department commanders.[3]

The General Order of 1868—Procedure. The interpretation thus given was in substance adopted, and the prevailing

1. As where it was applied to the reimbursement of a party for money or property *stolen* from him by a soldier, of which cases are found in G. O. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867. That the article cannot legally be resorted to for the relief of persons whose property has been the subject of *larceny* or *embezzlement*, or to indemnify the United States for *public* property appropriated or damaged—see DIGEST, 26.

2. DIGEST, 25.

3. See G. O. 123, Dept. of the Gulf, 1864; Do. 74, Dept. of Ark., 1865; Do. 48, 55, Dept. of La., 1866; Do. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867. *Contra*, O'Brien, 117, following Samuel, 464.

practice formulated, in G. O. 35, of the War Department, of 1868, as follows:—"Under the 32d, (now 54th,) of the Rules and Articles of War, it is made the duty of commanding officers to see reparation made to the party or parties injured, from the pay of soldiers who are guilty of abuses or disorders committed against citizens. Upon proper representation by any citizen of wanton injury to his person or property, accompanied by satisfactory proof, the commanding officer of the troops will cause the damage to be assessed by a board of officers, the amount stopped against the pay of the offenders, and reparation made to the injured party. This proceeding will be independent of any trial or sentence by court-martial for the criminal offence."

Under the Article, as illustrated and supplemented by this Order, the procedure is initiated by a "complaint made" by the injured party[1] to the commander of the regiment, post, &c. The commander may be directed by a superior—as by a department commander, in passing upon the proceedings of a court-martial previously ordered for the trial of the offender, or otherwise—to entertain the complaint, see to the matter of reparation, &c.;[2] or he may himself take action in the first instance, according to circumstances. The complaint, which will properly be expressed in writing, should set forth the details of the injury, and be sustained by evidence showing it to be meritorious and well-founded; and this evidence may also properly be required to be exhibited in the form of affidavits or written statements. The commander, if he deems it expedient, may examine the witnesses in person, or cause them to be examined and their testimony to be taken down by an officer of his staff or command. But the commander cannot properly himself initiate the investigation; *i. e.* cannot dispense with complaint or testimony from the aggrieved party and proceed *sua sponte.*

"Proper representation" having been made and "satisfactory proof" furnished, the commander will convene a "board" for the assessing of the damage. This, in a case of injury to *property*,

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1. It is not *essential* that the injured party personally make the complaint, as it may be made by a parent in behalf of a minor child, (G. O. 48, 55, Dept. of La., 1866,) by a police officer, (G. O. 161, Dept. of Washington, 1865,) or an attorney.

2. See instances in G. O. 123, Dept. of the Gulf, 1864; Do. 59, Dept. of Washington, 1866; Do. 48, 55, Dept. of La., 1866; Do. 6, Dept. of the Cumberland, 1867.

will be such amount as may justly and reasonably b
to make good the loss. In a case of injury to the *per*
ordinarily be a sum sufficient to reimburse the party
expenses incurred for medical or surgical attendanc
and the like.[1] The party cannot be awarded punitory
if he claims them, he must be referred to the civil c
assist it in its assessment, the board may avail itself o
mony of experts or other persons cognizant of values,

The conclusion of the board being approved by the co
he will, by the proper order, direct the amount to be stop
the pay of the offender on the muster and pay rolls o
mand, or otherwise charged against his pay account, til
lected in full, and the amount or amounts, as collected,
over, by the paymaster, company commander, or ot
officer, to the injured party or some duly authorized pe
behalf.

The Article specifies that the reparation shall be ma
as *part* of the offender's pay shall go toward" it. T
amount assessed is greater than the pay then due or w
become due at the next pay day, a portion only of suc
should properly be stopped against and deducted from
leaving the remaining portion to be similarly stopped
future payment or payments.

Where it appears that several persons were concern
disorder, the commander will divide the amount asses
the different parties in equal sums or in such proporti
may deem just. In some exceptional cases of dest
damage to private property participated in by membe
ments or other bodies of troops on the march, where i
been practicable to distinguish certain individuals as t
liable, a stoppage has been ordered, under this Artic
the entire command.[2]

As indicated in the Article, and specified in the last
the Order, the offender or offenders may be *tried* and
for the military offence involved in his or their act,
spectively of any proceeding for the reparation of the c

1. The only precedents of such an assessment which have
with are those in G. O. 48 and 55, Dept. of La., 1866.

2. DIGEST, 25.

under the Article. The *trial* will preferably be first ordered,[1] since, if the reparation be subsequently sought to be made, the commander and the board will have the benefit of any material facts developed upon the original investigation. So, if the accused be acquitted, such acquittal will furnish good ground for not favorably entertaining the complaint or for reducing the amount to be assessed. If, upon the trial, a forfeiture of pay be adjudged, such forfeiture, in its execution, will take precedence of a stoppage that may subsequently be made under the Article.[2]

It need scarcely be added that notwithstanding a trial by court-martial, and proceedings had under the Article, the offender will still be amenable to the *local law* for such crime or misdemeanor as may have been involved in his acts.[3]

Defects of the Article—Practice. It may be remarked of this Article, in conclusion, that it is antiquated in some of its terms, indefinite and obscure in its more important provisions, and, as at present construed, confers upon military commanders a summary authority, which is exceptional in our law and of doubtful expediency. In view of its defects, commanders have been reluctant to act upon it, and the comparatively rare proceedings which have been instituted have been mostly confined to the period pending and immediately succeeding a time of war. On the other hand there have been but two or three precedents of trials of officers for 'refusing or omitting' to comply with its injunctions.[4]

FIFTY-FIFTH ARTICLE.

Its Purpose. This Article, which, dating from an early period of the British law,[5] first appeared in our code in the Articles

1. This has in fact been done in the majority of cases. See G. O. 123, Dept. of the Gulf, 1864; Do. 48, 55, Dept. of La., 1866; Do. 59, Dept. of Washington, 1866; Do. 6, Dept. of the Cumberland, 1867.

2. And *vice versa*. DIGEST, 25.

3. DIGEST, 26.

4. See cases in G. O. 4, Dept. of the Ohio, 1863; Do. 161, Dept. of Washington, 1865. Compare here the penalty prescribed by the original Article (the 12th) of 1775—that the commander "shall be punished in such manner as if he himself had committed the crimes or disorders complained of."

5. Samuel, (p. 539,) while tracing it to ordinances of the reigns of Elizabeth and Charles I, adds: "This Article is formed principally on

of 1776,[1] is designed, by making severely punishable trespass committed by soldiers on the march or otherwise, to prevent straggling and maintain order and discipline in military commands, while at the same time availing to secure from intrusion and injury the premises and property of the inhabitants.

Construction—*"Waste or spoil."* These words, which are of similar signification, are not necessarily to be understood in a strictly legal or technical sense. Thus "waste" is defined by Bouvier as "*spoil* or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof, to the prejudice of the heir, or of him in reversion or remainder:" according to Greenleaf,[2] "it includes every act of lasting damage to the freehold or inheritance." But, as employed in this Article, the words "waste or spoil" may be held to embrace any deliberate or wanton destruction or damage done not only to the real estate itself but to animals or things kept or held within or upon it,[3] and to include acts of military persons, whether occupying the premises for the purposes of a camp or bivouac, marching through or near the same, or operating or being quartered in their neighborhood.

"Maliciously destroys any property whatsoever." The act here denounced is of a similar nature to the offence known to the common law, and which is now a statutory misdemeanor in most of the States, of "malicious mischief" or "malicious trespass." Under the present Article, however, in view of the general terms in which the offence is described, it is not considered necessary, as it was at common law,[4] to show that the accused was actuated by malice against the *owner* of the property, but is

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the 21st Art. of the rules for the government of the land forces, of James II." See Appendix.

1. The original Article, after the words "by the order of" the general commanding, &c., added the words, dropped in the form of 1806—"to annoy rebels or other enemies in arms against said States."

2. 2 Ev. § 650.

3. See a case in G. O. 10, Middle Mil. Dept., 1865, where the waste charged consisted mainly in injuries done to deer and sheep in a private park.

4. State *v.* Robinson, 3 Dev. & B. 130; State *v.* Newby, 64 No. Ca., 23, and cases cited; Northcot *v.* State, 43 Ala. 330. The common law rule has been modified by the statutes of some of the States.

:d sufficient to establish the existence of *any* form of mal-
s, for example, malice toward the race, class, or family to
. the owner belongs, or toward the thing itself where it is
.mal,[1] or toward a person who has the property in temporary
;sion as tenant or bailee,[2] or evil disposition in general.
: malice may be established by declarations of the accused,
before or after[3] the offence, or by acts or demonstrations
.ng personal ill will and resentment. Or it may be inferred
:he deadly or dangerous character of the weapon or instru-
employed, from the mere wantonness of the act, or from
f the circumstances that afford a presumption of malice
the proof of crimes of which malice is an ingredient.[4] The
nce of malice may be negatived by evidence that the act
mply one of carelessness, or a mere incident of a neglect
order, unaccompanied by personal or evil *animus;* or that
committed under a *bona fide* though mistaken sense of
or in compliance with the orders of a military superior
h such superior may not have been the army commander
.ed in the Article.
: *destruction* will be complete if the property be substantially
l for the purpose for which it was designed, as where cloth-
so injured that it cannot be worn,[5] or where telegraph wires
vered and thus rendered useless.[6]
ice being the gist of this second offence made punishable
: Article, the court, where the evidence shows an unjustifi-
estruction of property but without malicious intent, will
rly find the accused not guilty of the specific offence charged
ilty of "conduct to the prejudice of good order and mili-
iscipline."

elonging to inhabitants of the United States." This
expressed in the Article of 1776 as "belonging to the good
: of the United States," while general enough to embrace
ry persons as well as civilians, was evidently intended to

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ee State *v.* Avery, 44 N. H. 392.
tone *v.* State, 3 Heisk. 457.
tate *v.* Graham, 46 Mo. 490.
Iobson *v.* State, 44 Ala. 380; Hill *v.* State, 43 Id. 335.
ee case in G. O. 10, Dept. of the South, 1870.
ee case in G. O. 29, Dept. of the Gulf, 1874.

refer mainly or entirely to the latter. It includes of cou property of a corporation[1] equally with that of an indi So, although, as has been seen, the original Article was res in its application to acts directed against enemies or pers rebellion, the present statute, as a more general rule of disc applies to trespasses upon the property as well of resident as of citizens, and of disaffected or disloyal as well as o individuals.[2]

"Unless by order of a general officer command separate army in the field." This exception is a reco of a general principle of military law already referred to Art. 42, in treating of the offence of committing "plun pillage," *viz.* that the property of private individuals can be taken or destroyed by the military only in time of war the authority of the officer in chief command of the troop ating against the enemy. The general commanding, refe in the present Article, where the due prosecution of host or the exigencies of the situation may require it, is empow seize and consume private property, especially when requi supplies for his command or as material for quarters or de or to prevent its falling into the hands of the enemy.[3] In cising such authority he represents the sovereignty of th ernment; but no subordinate officer can undertake to e this function, or, however proper or desirable be the obj view, assume to make in the first instance the order whi statute empowers the army commander alone to originate.[4]

"Besides such penalties as he may be liable to by The Article has here in view the punishments affixed l statutes of the State, &c., to the commission of "malicio chief" and like offences. It thus recognizes the principl an officer or soldier, in committing a military disorder, be liable not only to trial by court-martial but also to the civil

1. See case in G. O. 29, Dept. of the South, 1874.

2. In a case in G. C. M. O. 15, Fourth Mil. Dist., 1867, an offi severely sentenced for destroying the type, printing material, &c., alleged disloyal or hostile newspaper. And see DIGEST, 26.

3. See PART II—THE LAW OF WAR.

4. Compare Terrill *v.* Rankin, 2 Bush, 453; Lewis *v.* McG Id., 202.

cature for such criminal offence, (or cause of action,) as may be involved in his wrongful act.

FIFTY-SIXTH ARTICLE.

The Original Form. This provision has come down from Art. 91 of Gustavus Adolphus, through Art. 11 of Sec. IV of Charles I and Art. 33 of James II. In our own original article on the subject—No. 24 of the code of 1775—it was prescribed that an officer or soldier who should "*do violence, or offer any insult or abuse, to any person,*" *&c.*, * * * *should suffer such punishment as should* "*be ordered by a regimental court-martial;*"—such court having, under that code, jurisdiction of the offences of officers as well as of soldiers. In the succeeding code—of 1776—the Article assumed substantially its present form.

Principle of the Article. This, and Art. 57, (making punishable the forcing of safeguards,) are the only ones in the code which provide specifically for the punishment of offences committed "*in foreign parts.*" An offence, to be cognizable under this, (or that,) Article must have been committed in time of war, or while our army was passing through the territory of a friendly power, or occupying some portion of a foreign country under a treaty, &c. The principle upon which a military court, in the absence of statutory authority, is invested with jurisdiction under the circumstances, is that of *extraterritoriality*, or a principle analogous thereto, by which an army, when without the domain of its own government, is held to carry with it its own code of discipline,—a principle already considered in Chapter VIII. In this instance, and that of Art. 57, the jurisdiction is conferred by express enactment.[1]

Object of the Article. The main object of the Article, according to Samuel[2] and Hough,[3] is to conciliate the inhabitants and induce them to bring provisions into the camp, &c., of the army by assuring to them protection in so doing. As violence

1. An offence of the kind described but committed within the Indian country in a Territory, would not be cognizable under this Article. See G. C. M. O. 77 and 88, Dept. of the Mo., 1870.

2. Pages 560–1. And see O'Brien, 115.

3. Page 307.

against them would effectually deter them, this is prohibited der the extreme penalty of death, and the prohibition is l properly to cover the period of their coming to, remaining and returning from, the camp or station.[1]

The "Violence" Contemplated. In view of the manda penalty of death imposed by the Article, the term *violen* strictly construed to mean an immediate violence to the per and to embrace any crime or offence involving a battery.[2] acts within the spirit but not the letter of the Article,—as for duct not involving bodily injury, (the "insult" or "abuse," example, included in the original Article,) or for a taking, dest tion, &c., of the provisions, unaccompanied by personal assaul the offender would still be liable to trial, and to a punishm proportioned to the gravity of his offence, under Art. 55 or 6

FIFTY-SEVENTH ARTICLE.

Its Scope. This provision is to be traced to Art. 12 of Ja the Second. As it first appeared in the code of 1776, it was t expressed:—"*Whosoever, belonging to the forces of the United St employed in foreign parts, shall force a safeguard, shall su death.*" Early in the late war, however, by an Act of Feb. 1862, the field of its application was extended to *the United St during a period of rebellion*, and it assumed its present form as Article of war in the revised code of 1874.

Premising that by the term, "rebellion against the supre authority of the United States," is mainly had in view that surrectionary status, (illustrated under the next Article,) the istence of which the President is, by the Act of July 13, 18 (Rev. Sts., Sec. 5301,) empowered at any proper time to decla we proceed to define the term "safeguard," and to consider what the offence of *forcing* one may consist.

The Safeguard—Its Nature, Form and Effect. The te "safeguard" has sometimes been treated as synonymous wi "safe-conduct,"[3] and the two have been confounded by so

1. Samuel, 566.

2. As *robbery*—the form of the violence in the cases in the G. C. O. cited in note 1, p. 949.

3. Halleck, Int. Law, 665.

writers on military law.[1] Both indeed are *personal* concessions and not transferable.[2] A safe-conduct, however, which is a privilege accorded generally to an enemy or an alien—especially where a diplomatic, consular, or other public official—of passing through the territory of a nation during war,[3] is quite different from a safeguard as that term is now understood in our military law. As used in the present Article, and described in the Army Regulations,[4] the word signifies a special privilege of protection for

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1. Samuel, 567–571; Hough, 311–314; Simmons § 204.

2. Like a passport. That safe-conducts are not transferable, see Vattel, (Chitty's edition,) 461; 1 Kent, Com., 162; Halleck, 663.

3. Vattel, c. XVII; 1 Kent, Com., 162; Woolsey, 337; Halleck, 663; Lieber, (G. O. 100 of 1863,) § 86, 87.

In a Resolution of May, 1776, (1 Jour. Cong., 339,) *Congress* guarantees to an individual a safe-conduct for a journey from one place to another and for a residence there during pleasure. The granting of safe-conducts was probably indeed more common at that time than it has been at any later period in our history. [See 3 Jour. Cong., 693, and the Act of April 30, 1790, s. 28, by which the violation of safe-conducts and passports is made punishable by fine and imprisonment as a crime against the United States.]

4. The following are the paragraphs of the Army Regulations relating to this subject:—

"SAFEGUARDS.

1083. Safeguards are protections granted to persons or property in foreign parts by the commanding general, or by other commanders within the limits of their command.

1084. Safeguards are usually given to protect hospitals, public establishments, establishments of religion, charity, or instruction, museums, depositories of the arts, mills, post-offices, and other institutions of public benefit; also to individuals whom it may be the interest of the army to respect.

1085. A safeguard may consist of one or more men of fidelity and firmness, generally non-effective non-commissioned officers, furnished with a paper setting out clearly the protection and exemptions it is intended to secure, signed by the commander giving it, and his staff officer; or it may consist of such paper, delivered to the party whose person, family, house, and property it is designed to protect. These safeguards must be numbered and registered.

1086. The men left as safeguards by one corps may be replaced by another. They are withdrawn when the country is evacuated; but if not, they have orders to await the arrival of the enemy's troops, and apply to the commander for a safe-conduct to the outposts.

1087. Form of a safeguard:

By authority of ——— ———,

A safeguard is hereby granted to [A. B———; *stating precisely the place, nature, and description of the person, property, or buildings.*] All

person, household, or property—all or either—against milita marauders or other disorderly parties, granted by a military co mander to private individuals, (deemed to have a claim upon t protection of the government,[1] or whose premises or property is thought desirable to protect in the interests of military dis pline or otherwise,[2]) to corporations, or to hospitals or other pu lic institutions or places.[3] In according this privilege, the co mander either causes a guard, (a soldier or soldiers,) to be poste at the dwelling of the applicant or other proper place, or he fi nishes the proper person with a formal certificate or order writing, subscribed by him in his official capacity to the effe that a safeguard has been granted, stating its subject and sco and calling upon the military to respect it. Or the command may furnish both guard and certificate: indeed, in practice person to whom is accorded a written protection is generally al supplied with a guard to assure and enforce it.[5] In common m

officers and soldiers belonging to the army of the United States a therefore commanded to respect this safeguard, and to afford, if nec sary, protection to [*the person, family, or property of* ———, *as the ca may be.*]

Given at Headquarters, the —— day of ———.

——————— Maj. Gen. Commanding.

——————— Adjutant General."

1. Tullock, (p. 39, 40,) refers to safeguards as privileges origina given, under the law of nations, to enemies, and, in 1811, extended Wellington to the inhabitants in Spain.

Persons holding property under the Government upon the theatre war, would of course, if their property were endangered, be entitled safeguards, where the public exigency would allow their being furnishe Thus, in G. O. 27, Dept. of the Tenn., 1863, it is ordered as follows: "All military commanders within this department will, on applicatic give safeguards to Government lessees of plantations on the Mississip River, for their stock, provisions, household property, and every thi connected with the plantations so leased."

2. Granting a safeguard to an *improper* person may constitute a mi tary offence. Thus, in a case in G. C. M. O. 267 of 1864, a general of cer was convicted of "conduct to the prejudice," &c., in furnishing safeguard for the protection of the property of a "notorious rebel," wit out "obliging him to take the oath of allegiance."

3. See the description of a safeguard in Halleck, 665. Compare al 1 Kent, Com., 163, note; Vattel, 369; O'Brien, 140; Army Regs., pa 1083, 1084. As to the granting by Gen. Scott of safeguards for church colleges, hospitals, mills, &c., in Mexico, see his Autobiography, p. 54

4. The guard is generally posted by the provost marshal. See G. 22, Mountain Dept., 1862.

5. The writing may be furnished to the guard, (see par. 1085. Arm

tary parlance the term "safeguard" is applied somewhat indifferently to the writing or order and to the sentry or guard:[1] trictly speaking, however, either is but the evidence of the existence of the privilege.

Where the grant of protection is in written form, the writing hould exactly and fully specify and describe the person or persons, property, buildings, places, &c., intended to be included: t should also properly state the limit of its duration, so that it nay be known for what period it is good, when it may require enewal, &c. Where a guard only is employed, the sentinel, or he officer or non-commissioned officer commanding the detail, hould be clearly instructed as to the same particulars.

By whom to be granted. The Army Regulations[2] describe afeguards as granted "by the commanding general or by other ommanders within the limits of their command." As "the ffect of a safeguard is to pledge the honor of the nation that the erson or property shall be respected by the national troops,"[3] he same could not in general properly be accorded by a subordinate commander, but should proceed from the commander of he army, department or district, or the officer commanding a eparate force acting independently in the enemy's country. It

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Regs., *ante;*) or to a person employed as custodian of the property. See O'Brien, 140.) Halleck, (p. 665,) writes of safeguards:—"Sometimes they are delivered to the parties whose persons or property are o be protected; at others they are posted upon the property itself, as pon a church, museum, library, public office, or private dwelling." In . O. 66, Army of the Potomac, 1862, it is ordered: "All safeguards ranted at these Headquarters will be countersigned by the Provost Marshal General. Persons found violating these safeguards will be intantly arrested by the provost marshals." As to the form of a written afeguard, see par. 1087, Army Regs., *ante;* also the form recited in the pecification of a case published in G. O. 111, Sixteenth Army Corps, 863. In some instances safeguards have been announced in General Orders. Thus, in Gen. Wool's Orders, No. 424 of 1847, it is declared hat safeguards have been granted to the following persons, their famies and property, (naming them and their *haciendas,*) and all officers nd soldiers are required to respect such safeguards, and afford protecon accordingly where necessary. And see O'Brien, 140.

1. Thus Vattel, (p. 369,) referring to safeguards as "granted to lands nd houses intended to be spared," adds—"These consist of *soldiers* ho protect them against parties by producing the general's orders." nd see McNaghten, 90.

2. Par. 1083, *ante*

3. O'Brien, 140.

is to be observed of a safeguard that,
mander of a separate army, &c., it i
respected, during the term of its ope
such commander, as well as by all
or forces who may occupy or pass thr

Revocation. A safeguard, howev
revoked for good cause, either at the
from whom it proceeded or his succe
order of a superior commander or the
cause would be the treason, treachery
ient, which, when discovered, would
worthy of the special protection affor

Forcing a Safeguard. The forc
guard will consist in a wilful disrega
injury of the person, property, &c., to
been accorded. In a majority of the
Orders, the offence consisted in plund
bery, committed upon premises whi
under the protection of a safeguard;
accompanied by violent or threatenin
mates.[5] The thrusting aside, disarm
assaulting, of a sentinel or guard pos
forcing a safeguard, or the failure to co

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1. See Vattel, 416, as to the rule, in th
conducts. As to safeguards, the same a
posted to enforce them must be respected
(p. 369,)—"The persons of these soldie
enemy as sacred: he cannot commit any
they have taken their station there as ben
his subjects." See par. 1086, Army Reg
A safeguard given for an illegal or tra
not entitled to respect. Similarly, Arnold'
being given him by a traitor with whom
and void as a safe-conduct. See Sec. 134

2. As to the rule in this respect in rega
418; 1 Kent, Com., 163; Halleck, 664.

3. "Every privilege when it becomes de
revoked." Vattel, 418.

4. See cases in G. O. 36 of 1864; Do. 2
111, Sixteenth Army Corps, 1863; Do. 31
105, Dept. of No. Ca., 1865.

5. G. O. 105, Dept. of No. Ca., 1865.

entering or interfering with the house, property, &c., placed under the protection, would be another marked form of a violation of the Article.[1]

It is of course essential to the specific offence that the accused should have known of the existence and purpose of the safeguard which he is accused of forcing.[2] In the absence of positive or presumptive evidence of such knowledge, his act can properly be found by the court to have amounted only to ordinary marauding, or to some trespass or disorder, ("to the prejudice of good order and military discipline,") of less gravity than the capital offence described in the Article.[3]

XXIII. THE FIFTY-EIGHTH ARTICLE.

[JURISDICTION OF CRIMES IN WAR, &C.]

"ART. 58. *In time of war, insurrection, or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with an intent to kill, wounding, by shooting or stabbing, with an intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided, for the like offence, by the laws of the State, Territory, or District in which such offence may have been committed.*"

Origin and Object. This provision, which, with but a single material change of language,[4] is a republication of s. 30 of the Act of Congress of March 3, 1863, c. 75, appeared first as an Article of war in the Revision of 1874. Its enactment, during the

1. See McNaghten, (p. 89,) who also notes, (p. 91,) that the forcing must be actual; that an *attempt* to force will not constitute a violation of the Article.

2. Samuel, 571; O'Brien, 141.

3. In the few instances in our service of convictions under this Article, the sentence—to be shot—has been mitigated by the reviewing authority. See G. O. 36 of 1864; Do. 105, Dept. of No. Ca., 1865.

4. This change is the omission of the words—"or military commission," after the words—"a general court-martial," an omission proper for the reason that a military commission is not the appropriate tribunal for the trial of *military* persons.

late war, introduced a most marked innovation into our law—th investing of general courts-martial with jurisdiction, in time o war, &c., of the graver civil crimes when committed by militar persons, without regard to whether such crimes directly prejudic military discipline or affect the military service. Its main ob ject evidently was to provide for the punishment of crimes i localities where, in consequence of military occupation, or th prevalence of martial law, the action of the civil courts is sus pended, or their authority cannot be exercised with the prompti tude and efficiency required by the exigencies of the period an the necessities of military government.[1]

The Jurisdiction Created—*Its limit as to time o occasion.* The operation of the Article is limited to "time o *war*, *insurrection*, or *rebellion*." The term *war* has been here tofore defined as including foreign or international war, internal or civil war, and the state of hostilities known as Indian war. Under Art. 57, *rebellion* has been referred to as the status o armed revolt against the authority of the Government, the exist ence of which the President is empowered in a proper emergency to declare, by Sec. 5301, Rev. Sts. *Insurrection* is but a less ex tended form of rebellion, as rebellion is, ordinarily, less extended than civil war. It is remarked by Grier, J., in the Prize Cases,[2] that—"insurrection against a government may or may not cul minate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government." In our late war, however, in view of the dimensions of the exist ing insurrection, the words "rebellion" and "civil war" came to have for the time substantially the same meaning, and the terms "insurrection" and "rebellion" were indifferently em ployed with a similar import in executive proclamations and orders as well as in statutes.

Duration of war, &c.—Commencement of the period. In order to determine the limit of the jurisdiction as to *time*, it

1. See remarks of Gen. Pope in G. O. 29, Dept. of the Northwest, 1864. In Coleman *v.* Tennessee, 97 U. S. 513, it is observed that "the swift and summary justice of a military court" was invoked by this Article, "not merely to insure order and discipline among the troops but to protect citizens from the violence of soldiers."

2. 2 Black, 666.

will be necessary to consider when a period of war, &c., commences and when it ends.

A foreign or international war will generally commence to exist upon a declaration of the same in some form by Congress under the clause of the Constitution which empowers that branch of the government "to declare war." Thus the war of 1812 was declared by the Act of June 18th of that year, consisting of a single section, enacting—"*That war be and the same is hereby declared to exist between the United Kingdom of Great Britain and Ireland and the dependencies thereof, and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal,*" &c. In the only other instance in our constitutional history of a foreign war—that with Mexico, the declaration was less formally contained in the preamble to an Act of May 13, 1846, in these words:—"*Whereas, by the act of the Republic of Mexico, a state of war exists between that government and the United States,*" &c.,—the statute then proceeding to empower the President to employ the army, navy, militia, and a specified force of volunteers, for the prosecution of the war, and making appropriations for the purpose.

But a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war. Such a war cannot indeed be declared or initiated by the President, but, if declared or commenced against us by another power, which, thereupon, before our Congress can or does act, proceeds to invade our territory, or to attack the defences of our coast or frontier, such invasion or attack must, under the orders of the Executive as Commander-in-chief, be met and resisted by force against force, and in this armed meeting and resistance there is war.[1] Under such circumstances a legal status of foreign war would actually exist, and the jurisdiction created by the present Article would become operative, in the absence of, or rather prior to, any formal declaration or other action on the part of Congress.

A *civil war* resembles this last form of foreign war in that it

1. On this point see remarks and rulings of Grier J., in Prize Cases, 2 Black, 668. Specific authority to employ the militia to repel an invasion is vested in the President by Sec. 1642, Rev. Sts.

exists of its own force and independently of any authenticati of Congress; the Constitution making no provision for the d laration either of the beginning or end of such a status. Tl in the Prize Cases,[1] the court say of civil war that it "is ne solemnly declared; it becomes such by its accidents—the nu ber, power, and organization of the persons who originate carry it on." And the like is true of an *insurrection* or *rebell* not properly amounting to a civil war;—it commences and exi in the sense of the Article, when it has assumed such proporti that it becomes necessary to employ the armed force of the Uni States to combat and suppress it.

The proper date, however, of the commencement of suc status will ordinarily be determined by the *proclamation* or or issued by the President, (in conformity with the existing stat law, if any,) declaring the existence and character of the insur tion, requiring the insurgents to disperse, calling out the mili announcing the proposed employment of the army and navy, & In the instance of the "Whiskey rebellion" in western Pe sylvania, the existence of the insurrectionary status was decla by the President in two proclamations issued under the Act May 2, 1792, the second of which, of Sept. 25, 1794, was p lished immediately before marching the militia and volunte against the insurgents.[3] Later, in the case of the obstruction the same State to the enforcement of the tax upon dwellings, & the status of insurrection was first announced by proclamat of the President of March 12, 1799.[4] In the further case of recent Southern rebellion, the Supreme Court of the Uni States, in the case of The Protector,[5] fixed upon the Presiden proclamation of intended blockade of April 19th, 1861, as pr erly establishing the date of the commencement of the war stat so far as concerned the States, mentioned therein, of South Ca lina, Georgia, Alabama, Florida, Mississippi, Louisiana, a Texas; and the supplementary proclamation of the same ch acter, of April 27th, 1861, embracing Virginia and North Ca lina, as furnishing such date with reference to events occurri

1. 2 Black, 666.
2. See The Protector, 12 Wallace, 700.
3. Wharton, State Trials, 118, 141.
4. Id., 458.
5. 12 Wallace, 700. And see Prize Cases, 2 Black, 635.

:hose two States. These proclamations were issued during a ess of Congress, the former announcing in terms the inaugu- .on of the "insurrection."[1]

'he *existing law*, under and by the authority of which, in the nt of insurrection, &c., the President would take action, by clamation, &c., is contained in Title LXIX of the Revised .tutes.

Termination of the period. The Constitution, in vesting the President, "by and with the advice and consent of the iate," the authority to make treaties, practically constitutes n, concurrently with that body, the peace-making power so far relates to wars with foreign nations. In the instance therefore such conflicts, the war status will properly be held to end with : date of the *treaty*, or other agreement for the cessation of stilities, thus formally entered into with the foreign power—a e which will ordinarily be publicly announced by executive clamation.

n the case of a *civil* war, rebellion, &c., in the absence of any istitutional or legislative provision on the subject, a proclama- n by the President to the effect that hostilities have come to end or the rebellion or insurrection has been suppressed, may linarily be accepted as fixing an authoritative date for the dis- itinuance of the *status belli*. This mode of legally termin- ng such status was resorted to in the instance of the late re- lion, and has been recognized by the courts as sufficient.[2] In : case of The Protector,[3] the Supreme Court held that the war sed, in all the States except Texas, on April 2d, 1866, the date the President's proclamation announcing the final suppression

. A previous proclamation of April 15th, had announced the fact of an anized opposition to the laws and obstruction to their execution, and led out the militia to suppress the same, &c. It was the next suc- ding proclamation of the 19th, however, which first declared the ex- nce of the insurrection as such. As to the subsequent sanction, by islation of Congress, of this proclamation,—a sanction, however, evi- itly regarded by the court in the Prize Cases as quite unnecessary in ',—see 2 Black, 670, 671.

:. "The suppression of the rebellion describes a political condition, l not a judicial fact. That condition can only be defined and de- mined by the political departments of the government; and their ision is not only binding but conclusive upon the judiciary." Gross- yer *v.* U. S., 4 Ct. Cl. 15.

;. 12 Wallace, 702.

of the rebellion in those States, and in Texas on August 2 following, the date of the proclamation declaring its extinc in that State and generally.[1]

In several cases in which courts-martial assumed to exe jurisdiction, under Art. 58, *after* this date, their sentences formally disapproved as adjudged in time of peace.[2]

Whether *Congress*, by its legislation, (resorted to subseque to the date of these proclamations,) of March, 1867, known a Reconstruction Laws, did not in fact pronounce that the st of rebellion was still subsisting, so far at least as to authori to provide for the government of the insurrectionary States, question which will be adverted to in PART II of this work.

It may well be remarked here that no temporary *truce or ar tice*, pending hostilities, will have the effect to discontinue or pend the war status, so as to deprive military courts during interval of the jurisdiction created by the Article.[4]

As to *Indian* warfare, this, with us, is prosecuted under varying situations that the question whether a certain offenc the class specified in the Article was committed during a pe of such war can be determined only by the circumstances of particular case. If committed pending active operations ag an Indian tribe, during the interval after the troops have ent upon the campaign and before they have been ordered to re to their previous posts as being no longer required for the p ecution of hostilities, it may be said to have been committe a "time of war," and thus to be cognizable by a court-ma under the Article.[5]

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1. And see Grossmeyer *v.* U. S., 4 Ct. Cl. 28.

2. See cases in G. O. 59, Dept. of Washington, 1866; Do. 14, D of the South, 1866; Do. 15, Dept. of the Gulf, 1866; Do. 85, Dept the Cumberland, 1867; Do. 14, Dept. of Dakota, 1868.

A court-martial can of course have no capacity of itself to deter whether a state of war has begun or ended, but must accept the as declared or recognized by the proper superior authority. See GEST, 28.

3. See PART II, Title VII.

4. That a truce or armistice is not peace, but merely a suspensio active military operations of a hostile character—see Vattel, book II 234; Lieber, (G. O. 100 of 1863,) § 142.

5. In a recent case, in G. C. M. O. 12 of 1882, three Indian scou the U. S. service were sentenced to be hung on conviction of murde violation of Art. 58, (and mutiny,) committed in Arizona, during a riod of active hostilities against Apaches.

The period as affected by the place. It is to be noted that where the hostilities are confined to a particular State or States, or to any particular portion of the territory of the Republic, a court-martial will, strictly, be authorized to exercise the jurisdiction conferred by the Article only in cases of crimes committed within the limited theatre of such hostilities, for it is "time of war," &c., only in such locality. This condition is especially applicable to crimes committed in Indian wars, whose field is necessarily restricted to some inferior, though not always well-defined, region of the public domain.[1]

Jurisdiction of courts-martial in time of peace not affected by the Article. The Article, in investing general courts with a special jurisdiction of certain crimes in time of war, by a necessary implication excludes them from exercising jurisdiction over the same in time of peace, except in so far as they may be authorized to exercise it under other Articles. The only *specific* provision conveying such authority is that of Art. 60, by which *larceny* is made cognizable, at all times, by courts-martial, where committed in respect to *public* property. Except in this instance the crimes named in Art. 58 cannot, in time of peace, legally be brought to trial by court-martial, unless they may come within the description of the general Article 62,—in that, being not capital, they are committed under such circumstances as to be "*prejudicial to good order and military discipline;*"[2] or may constitute "*conduct unbecomiug an officer and a gentleman*" within the meaning of Art. 61.[3] Under Art. 62, courts-martial have duly and not unfrequently taken cognizance of civil crimes when committed by soldiers, (and within the above description;) and that this jurisdiction is not affected by the provisions of Art. 58 is thus noticed by the U. S. Supreme Court in the recent case of *Ex parte* Mason:[4]—"As it" (Art. 58) "is to operate in time of war, it neither adds to nor takes from the powers which courts-martial have under the 62d Article in time of peace."

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1. See Chapter VIII, p. 121—Jurisdiction under Art. 63: Application to Indian wars.'
2. See *post*—Sixty-Second Article.
3. See *post*—Sixty-First Article.
4. 105 U. S., 699. And see DIGEST, 27, 4a

The military jurisdiction conferred by the Article exclusive of that of the civil courts. That the jurisdic created by the Article is not exclusive of, but concurrent w that possessed by the criminal courts of the United States o States, has been repeatedly declared. Thus, in the leading on this point, Coleman *v.* Tennessee,[1] the Supreme Court h as follows:—"The section does not make the jurisdiction o military tribunals exclusive of that of the State courts. It not declare that soldiers committing the offences named shal be amenable to punishment by the State courts. It simpl clares that the offences shall be *punishable*, not that they *sh punished* by the military courts; and this is merely saying they *may* be thus punished. Previous to its enactment th fences designated were punishable by the State courts, and sons in the military service who committed them were deliv over to those courts for trial; and it contains no words indica an intention on the part of Congress to take from them the j diction in this respect which they had always exercised. V the known hostility of the American people to any interfe by the military with the regular administration of justice in civil courts, no such intention should be ascribed to Congre the absence of clear and direct language to that effect."[2]

The Crimes specified in the Article. These crimes wil defined in the following order:—Murder, Manslaughter, Mayh Rape, Robbery, Arson, Burglary, Larceny, Assault and Bat with intent to kill, &c. For anything further than definitions the details of definitions, the student must be referred to treatises of the approved authorities on criminal law and rulings in adjudged cases.

To be defined by the common law. It is to be obser that as these crimes are not specifically defined in the Article elsewhere in the written military law, they are to be interpre

1. 97 U. S. 513–14.

2. And, to a similar effect, see People *v.* Gardiner, 6 Park. 143; S *v.* Rankin, 4 Cold. 146; Whiting, War Powers, 376; G. O. 29, Dept the Northwest, 1864; Do. 32, Dept. of La., 1866; DIGEST, 27. Bu Coleman *v.* Tennessee, it is held that the military courts had necessa exclusive jurisdiction of a homicide committed by a soldier in Tenne in 1865, since the army could not legally be subjected to the laws or tri nals of the enemy's country *in time of war.*

by the doctrines of the *common law*, each being viewed as the common-law offence of the same name.[1]

Degrees of crime not known to the law military. In this connection it may also be noted that no such distinctions as *degrees* of offences, such as are established by the statutes of some of the States, are recognized by the military law,[2] and that such distinctions have no bearing whatever upon the subject of the definition of the crimes specified in the Article, but are material only with reference to the question of their punishment, hereafter to be considered.

Murder—*Definition.* Murder, at common law, is the unlawful killing, by a person of sound memory and discretion, of any reasonable creature in being and under the peace of the State, with malice aforethought either express or implied.[3] The homicide must be unlawful, that is to say "felonious" or other than "justifiable" or "excusable;" it must be committed by one who is neither *non compos* nor an infant under the age of criminal capacity; the person assailed must be a living being, (not an unborn infant;) such person must be entitled to the protection of the laws, not a public enemy[4] nor a pirate; and lastly the act must be characterized by "malice aforethought" or "malice prepense," *i. e.* evil and deliberate purpose.

A brief description of murder which would cover all cases likely to arise under the present Article would be—the unlawful killing, with malice aforethought, by a legally responsible person, of any other person not a public enemy; or, as all killing with malice aforethought must be unlawful, as a person not legally responsi-

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1. That common-law rules are to be followed in defining designations of crimes, and construing technical words, in criminal statutes, (in the absence of specific definition in the statute itself,) see U. S. *v.* Magill, 1 Washington, 463; U. S. *v.* Outerbridge, 5 Sawyer, 620; 1 Hale, P. C., (Am. Ed.,) 454, notes.

2. So, no such discriminations are recognized in the laws of the *United States* relating to civil crimes. DIGEST, 341; U. S. *v.* Outerbridge, *ante.*

3. Coke, 3 Inst. 47; 4 Black. Com. 195; 1 East, P. C., 214; 1 Russell, 482; 1 Gabbett, 454; 3 Greenl. Ev. § 130; 1 Wharton, C. L. § 303; 2 Bishop, C. L. § 732, and notes; Com. *v.* Webster, 5 Cush. 304; G. O. 23, Dept. of Cal., 1865.

4. That taking the life of an enemy, after he has surrendered, or will held as a prisoner of war, is murder—see State *v.* Gut. 12 DIGEST, 341-2.

ble cannot be chargeable with malice aforethought, and as killing of a public enemy can be regarded as committed with s malice,—murder, at common law and unaffected by statute, r be simply and briefly described as *homicide with malice af thought.*[1]

The definition of murder is completed by adding that, to c stitute this crime, the *death must occur within a year and a* after the date of the act. This is the rule for both specie homicide, murder and manslaughter, at common law. Where death is not shown to have followed within a year and a day, law presumes that the wound or injury was not the occasio the death—that it proceeded from some other cause.[2]

It may here be noted that where the act which is the caus the death is committed in one State or district, while the ac death occurs in another, it is the former place which is in l as held in Guiteau's case,[3] the *place* of the murder or homic

Malice aforethought. The term *malice*, as ordinarily ployed in criminal law, means simply the *wrongful intent* es tial to the commission of crime. When used, however, in c nection with the word "aforethought" or "prepense," in defin the particular crime of murder, it signifies the same evil int as the result of a determined purpose, premeditation, deliberati or brooding, and therefore as indicating, in the view of the l a malignant or depraved nature, or, as Foster has expressed "a heart regardless of social duty and fatally bent upon n chief."[4] The deliberate purpose need not have been long en tained; it is sufficient if it exist at the moment of the act. Ma aforethought is either "express" or "implied;" *express*, wh the intent,—as manifested by previous enmity, threats, the

1. Compare Holland *v.* State, 12 Fla. 117.

2. 3 Greenl. Ev. § 120, 131—note, 143; 1 Wharton, C. L. § 312 Bishop, C. L. § 640.

3. U. S. *v.* Guiteau, 1 Mackey, 498.

4. Crown Law, p. 257, 262. In Com. *v.* Webster, 5 Cush. 304, Sh C. J. says of "malice" in the term "malice aforethought," that it is "us in a technical sense, including not only anger, hatred and revenge, b every other unlawful act and unjustifiable motive. It is not confined ill will toward one or more individual persons, but is intended to d note an action flowing from any wicked and corrupt motive." And s the case of murder, indicating a malignant *animus*, commented upon l Gen. McDowell in G. O. 23, Dept. of Cal., 1865.

ıce of any or of sufficient provocation, &c.,—is to take the life the particular person killed, or, since a specific purpose to *kill* not essential to constitute murder, to inflict upon him some ɔessive bodily injury which may naturally result in death;[1] *blied*, where the intent is to commit a felonious or unlawful act : not to kill or injure the particular person—as where a party, ending to kill by shooting, &c., one person, actually hits and ls another;[2] or, when detected in a burglary, fires his pistol in : dark to aid his escape and kills an inmate of the house; or, be- ; engaged in a riot, fires indiscriminately and kills some one; in resisting an officer of justice engaged in the execution of his :y, unintentionally kills him, &c. Thus a soldier who resists ıilitary superior, when legally engaged in making an arrest or :cuting any other duty, and in resisting kills him, though not ·posely, he is guilty of murder in law.[3]

n every case of apparently deliberate and unjustifiable killing, : law *presumes* the existence of the malice necessary to consti- e murder, and devolves upon the accused the *onus* of rebutting : presumption. In other words, where in the fact and circum- nces of the killing as committed no defence appears, the ac- ed must show that the act was either no crime at all or a crime ; than murder; otherwise it will be held to be murder in law.[4]

. "The law considers that the party meant to effect what was the ıral consequence of his act; that if the natural consequence of his was death, he meant to kill." U. S. *v.* McGlue, 1 Curtis, 3. That ing in a duel is murder, see "Twenty-Sixth Article."

. As in the case of a soldier who, in resisting arrest by an officer, :harged his musket at him with intent to kill him, but killed instead ther soldier. Angell *v.* State, 36 Texas, 542; DIGEST, 341.

. See U. S. *v.* Travers, 2 Wheeler, C. C. 490, where the killing was a private marine of an orderly sergeant who was properly attempting ırrest and restrain him while engaged in a brawl.

. Foster, 255; 1 Gabbett, 455, 502; Manual, 110. "When on the l of an indictment for murder, the killing is proved to have been nmitted by the defendant, and nothing further is shown, the presump- ı of law is that it was malicious, and an act of murder, and proof of tter of excuse or extenuation lies on the defendant." Com. *v.* York, Mass., (9 Met.,) 93. "Malice is implied in every case of intentional nicide; that is to say when once it is established that a person was ntionally killed, the law implies that malice existed in the person who sed the death. If there are any circumstances of excuse or pallia- ı which will rebut the presumption of malice, it is incumbent on him how them." U. S. *v.* Outerbridge, 5 Sawyer, 622. And see U. S. ravers, 2 Wheeler, C. C. 490; Holland *v.* State, 12 Fla. 117; People Gibson, 17 Cal. 283; People *v.* Walter, 1 Idaho, 393.

Justifiable and excusable homicide. The definition Murder is well illustrated by the two defences apposite to t charge, viz: 1, that the killing was not murder but manslaugh 2, that it was not felonious but justifiable or excusable in la The distinction between murder and manslaughter will be no presently. Homicide is said to be "justifiable" when commi by a public officer in the due execution of the laws or admi tration of public justice, or when committed by any person in due prevention of a violent crime. So, homicide is justifi where committed by an officer of the army, or at his instance the suppression of a mutiny or other violent disorder, or in capture of an escaping prisoner or deserter, where no other av able means are adequate for the purpose. Homicide is in "excusable" where it is the result of accident or mishap where it is committed in self-defence.

Self-defence. "A man may oppose force to force in defe of himself, his family or property."[2] Only such amount of fo however, may be used as is reasonably proportionate to the d ger. Killing in defence of the person will be justified where circumstances are such as to warrant the conviction that dan to life or serious bodily harm is threatened and immediately pending.[3] In defence of property, killing, as a means of p venting a trespass unaccompanied by violence, will not be ju fied. Where the trespass is serious, as in a case of housebreak with evident felonious intent, the occupant, especially if breaking be in the night, will be justified in taking life in p tection of his domicil.

Manslaughter. This crime is defined as an *unlawful killi without malice aforethought express or implied.* It is this a sence of malice aforethought which distinguishes manslaught

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1. Homicide is described by the authorities as of three species:—"felo nious" homicide, (which is either murder or manslaughter,) "justifiable homicide, and "excusable" homicide,—the two latter not being crime at all. The defence that homicide is justifiable or excusable is pertinent to an indictment or charge either for murder or manslaughter.

2. U. S. *v.* Wiltberger, 2 Washington, 515.

3. See G. O. 10, Dept. of the Platte, 1871. In justifying a killing i self-defence, it is admissible to show that the deceased was a person o violent nature, bad temper or a quarrelsome disposition. Williams s State, 74 Ala. 18; Territory *v.* Harper, 1 Ariz. 599.

from murder; its commission being ascribed to the "infirmity of human nature," and not to a depraved or wicked heart.[1] The only *malice* in manslaughter thus is the wrongful intent which is an ingredient in crime in general.

The authorities specify two kinds of manslaughter—*voluntary* and *involuntary*. "Voluntary" manslaughter, (the more usual of the two,) is that which is committed in a moment of excitement or while under the influence of passion, and commonly either in the course of a sudden *fighting* or upon some immediate strong provocation. "Involuntary" manslaughter consists in the accidental and unintentional causing of death, either by the doing or attempted doing of an act which, though unlawful, is not felonious or highly criminal or likely to be dangerous to human life, or by the doing of a lawful act in an incautious or negligent manner.

To determine whether an act of homicide is murder or voluntary manslaughter, the main test is the quality of the provocation by which the act was induced. Mere words, however gross or insulting, will not justify taking life, and where a homicide is committed under no other provocation than irritating language, the killing will be murder in law.[2] The same is true of gestures, unless they be of a character manifestly threatening to life—as where a pistol or other deadly weapon is evidently attempted to be drawn and used; in such case the crime committed may be reduced to manslaughter. In any case where the provocation, though material, is not excessive, as where a bare trespass is committed on property other than a dwelling, or where the person is assailed but not seriously, or where a more considerable battery is committed by a party not accountable—as a drunken man, the law will in general hold the killing to be not manslaughter but murder.

So, a homicide is commonly *manslaughter*, where, being unaccompanied by an intent to kill, it yet lacks some element which

1. "The true nature of manslaughter is, that it is homicide mitigated out of tenderness to the frailty of human nature." Shaw C. J., in Com. v. Webster, 5 Cush. 307. And see 4 Black. Com., 191; 3 Greenl. Ev., 119, 125; 1 Wharton, C. L. § 304; 2 Bishop, C. L. § 625, 672; G. O. 23, Dept. of Cal., 1865.

2. "No mere words applied by one man to another will justify the use of a deadly weapon; nor can they be the lawful occasion of that heat' which would reduce the act of killing from murder to manslaughter." U. S. *v.* Carr, 1 Woods, 480.

would have made it "justifiable" or "
where a military superior, in enforcing
take the life of an inferior, when less
tion or restraint are available, his act is
he is guilty of manslaughter.[1] Simil
the exercise of an unduly severe meas
fliction of an excessive punishment, caus
the death of an inferior, such superior i
tary manslaughter.[2] And the legal cri
the superior causes the death of anoth
in not properly regulating the use of fi
as in target firing or artillery practice.[3]

Mayhem. Mayhem, maiming, or
the violently inflicting, upon any part
an injury as to render him less able t

1. In G. C. M. O. 47 of 1877, in a case o
slaughter in causing the death of a soldie
him with his sword, the Secretary of Wa
will be especially remembered by officers t
bullet to enforce their authority can only
the instant suppression of mutiny or viole
this exceptional power of life or death upo
pects in him the equable temper and judg
exercise, and holds him accountable accor
ful for an officer so to lose his head as to b
tween a drunken brawl and a mutiny." A
of 1867, in which an officer is convicted o
serting soldier by having him needlessly
1866; DIGEST, 314; Ensign Maxwell's c
note Rex *v.* Thomas, 1 Russell, Cr., 73
shooting and killing of a civilian by a sent
Otherwise, where the shooting, &c., an
quate means. DIGEST, 313; G. C. M. O. 1
Mil. Dist., 1868; S. O. 158, Hdqrs. Gen.
1868. And compare XIV Opins. At. Gen
Court in U. S. *v.* Carr, 1 Woods, 484, that
officer charged with the order and disciplin
with scrupulous nicety the amount of for
order. The exercise of a reasonable discr

2. 1 Wharton, C. L. § 431; U. S. *v.* Co
v. Freeman, 4 Mason, 505, a master of a
of a sick seaman by forcing him to go aloft
ter. If the act is characterized by a brutal
will be *murder*. Id.

3. See Regina *v.* Hutchinson, 9 Cox, 5
14 of 1871.

ainst his adversary; the gravamen of the offence being that the t permanently disables the person "to fight in defence of the ng and country, and as a soldier protect himself on the field of ttle."[1] Thus, while to cut off or disable a hand, an arm, or a leg, to strike out or blind an eye, was a mayhem at common law, deprive a person of an ear or of his nose was held *not* to be, ıce such an injury would disfigure only and not incapacitate for ar-service.[2] Acts indeed of the latter character have, *by statute*, en made punishable similarly to common-law maims,[3] but such ts, (except perhaps when committed at a place under the exclu-ve jurisdiction of the United States,) would not properly be cog-zable as "mayhem" under the present Article,[4] which, as to ıis term, is to be interpreted by the common law.[5]

To constitute mayhem, it was not deemed essential that the jury should be inflicted upon another; a self-mutilation being garded as within the definition. Thus a soldier who deprived

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1. 1 Hawkins, c. 44, s. 1; 4 Black. Com., 205; 1 Russell, 719; 1 Gab-ett, 98; 1 Wharton, C. L. § 581; 2 Bishop, C. L. § 1001; Com. *v.* Newell, Mass. 248; State *v.* Briley, 8 Port. 474. Neither the weapon or in-rument by which, nor the manner in which, the disabling or injury is fected, is material. U. S. *v.* Scroggins, Hempstead, 478; Rex *v.* Car-ll, Leach, 55. It is no less mayhem, though the severed member is stored to its place and grows again. Slatterly *v.* State, 41 Texas, 619.

2. 1 Hawkins, c. 44, s. 2; 4 Black. Com., 205; 1 Russell, 720; 1 Whar-n, C. L. § 581; Scott *v.* Com., 6 S. & R. 226.

3. Thus by the Act of April 30, 1790, c. 9, s. 13, (now Sec. 5348, Rev. s.,) the maliciously cutting off an ear, cutting out or disabling the ngue, putting out an eye, slitting the nose, cutting off the nose or lip, d the cutting off or disabling of any limb or member, with intent to aim or disfigure, are made together equally and alike punishable with ıprisonment and fine. Our statute is derived mainly from the 22 & 23 harles II, c. 1, known as the "Coventry Act," from Sir John Coventry, member of parliament, who had been assaulted by a slitting of the nose. e U. S. *v.* Scroggins, Hempstead, 478.

4. In a recent case in G. C. M. O. 103, Dept. of the Mo., 1881, in which e biting off, by a soldier, of a large piece of the *ear* of another soldier as charged as 'Mayhem in violation of the 62d Art. of war,'—while ch charge was properly held a substantially sufficient pleading of a dis-der under the Article named, and the proceedings were approved, it as well remarked that the act did "not constitute mayhem within the mmon law meaning of that term." And see the similar cases in G. O. , Dept. of Texas, 1870; Do. 36, Dept. of the Platte, 1871.

5. As to this rule of interpretation as applying to the present Article nerally, see *ante*—MURDER.

himself of the use of a member necessary to qualify him for t military service, was considered to be chargeable with a mayhe

The malice, or criminal purpose, essential to legal mayhem, i the intent to effect the disabling of a member, may be presum from the circumstances of the act by which the maiming is fected. It is not necessary to show that this intent was the re of deliberation, since it may be formed instantaneously, or u or in the course of a sudden encounter or combat.[2] As in case of homicide, the charge may be disproved by evidence sh ing that the injury caused was committed in self-defence.[3]

Rape—*Definition.* Rape is defined as the unlawful ca knowledge of a woman forcibly and against her will or conse

The persons. It is a general principle that rape must committed by a male person of at least fourteen years of age being a conclusive presumption of the common law that a per of a less age is physically incapable of its perpetration. I therefore the almost uniform ruling of the courts that where accused is under fourteen, evidence to show that he is an exc tion to the rule and in fact capable will be inadmissible.[5]

The person upon whom the crime is committed may be of a age; a female is never too young to be the subject of it.[6] So, subject may be any woman except the legal wife of the accus even although she be his mistress, or a common harlot.[7]

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1. Rex *v.* Wright, 1 East, 396; 1 Russell, 720. "One may not in cently maim himself; and, if at his request another maims him, both guilty." 1 Bishop, C. L. § 259.

2. 1 East, P. C., 393.

3. 1 Wharton, C. L. § 582; 1 Bishop, C. L. § 257.

4. Co. Lit., 123 b; 1 Hawkins, c. 41, s. 1; 4 Black. Com., 210 East, P. C., 434; 1 Russell, 675; 1 Gabbett, 831; 3 Greenl. Ev. § 2 1 Wharton, C. L. § 550; 2 Bishop, C. L. § 1113.

5. 1 Hale, 630; 4 Black. Com. 212; 1 Russell, 676; 3 Greenl. Ev. § 2 1 Wharton, C. L. § 551; 2 Bishop, C. L. § 1117; Reg. *v.* Phillips, 8 C P. 736; Reg. *v.* Allen, 9 C. & P. 31; People *v.* Randolph, 2 Park. 2 State *v.* Handy, 4 Harr. 566; State *v.* Sam, Winst. 300.

6. 2 Bishop, C. L. § 1118; Stephen *v.* State, 11 Ga. 227.

7. 1 Hale, 628; 1 Hawkins, c. 41, s. 2; 4 Black. Com. 213; 1 Russ 677; 1 Gabbett, 832; 3 Greenl. Ev. § 211; 1 Wharton, C. L. § 564 Bishop, C. L. § 1119; People *v.* Abbott, 19 Wend. 192; Pleasant State, 13 Ark. 362; Higgins *v.* People, 1 Hun, 307; G. O. 26, Fifth Dist., 1867. In stating the law, that rape may be committed even u a concubine, East, (1 P. C., 445,) adds—"for a woman may forsake

The Carnal Knowledge. This is established by proof of penetration only. The least penetration will be sufficient. It is not necessary to prove emission nor even that the *hymen* was ruptured or injured.[1] "The essence of the crime," as the court observe in an early case, "is not the begetting of a child, but the violence done to the person and feelings of the woman, which is completed by penetration."[2]

The force. The force implied in the term "rape" may be of any sort, if sufficient to overcome resistance. The intent to ravish by force, notwithstanding resistance, is the gist of the offence.[3] It is not essential that the force employed consist in physical violence; it may be exerted in part or entirely by means of other form of duress, or by threats of killing or of grievous bodily harm or other injury, or by any moral compulsion.[4] A less degree of force or intimidation will ordinarily be required to be shown where the female is of tender age, in feeble health, or imbecile, than where she is mature, strong and intelligent.[5]

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unlawful course of life, and the law will not presume her incapable of amendment."

1. 1 East, P. C. 438; 1 Russell, 678–9; 3 Greenl. Ev. § 210; 1 Wharton, C. L. § 554, 555; 2 Bishop, C. L. § 1132; Reg. *v.* Allen, 9 C. & P. 31; Reg. *v.* Jordan, Id., 118; Reg. *v.* Hughes, Id., 752; State *v.* Le Blanc, 3 Brev. 339; Waller *v.* State, 40 Ala. 325. Upon this point, however, the English rulings conflicted in some measure until the law was settled by the statute of 9 Geo. 4, c. 31, which enacted that—"the carnal knowledge shall be deemed complete upon proof of penetration only." Statutes to a similar effect exist in many of our States.

2. Pennsylvania *v.* Sullivan, Add. 143. "The essence of the crime consists in the violence done to the person of the sufferer, and to her sense of honor and virtue." 3 Greenl. Ev. § 210. Or, in the language of Foster, (p. 274,) "her quick sense of honor and pride of virtue."

3. "The jury must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part." Rex *v.* Lloyd, 7 C. & P. 318. And see 1 Russell, 692; Com. *v.* Merrill, 14 Gray, 417.

4. "If the woman submitted from terror, or the dread of greater violence, the intimidation becomes equivalent to force." Pleasant *v.* State, 13 Ark. 374. If the jury are "satisfied that her will was overcome by fear of the accused," a conviction will be proper. Strang *v.* People, 2 Mich. 1. And see 1 Hawkins, c. 41, s. 6; 1 East, P. C. 444; 1 Russell, 677; 3 Greenl. Ev. § 211.

5. See 1 Wharton, C. L. § 558, 560; 2 Bishop, C. L. § 112

Non-consent. Absence of free will, or non-consent,[1] on t part of the female, may consist and appear in her making resi ance till overpowered by physical force; in her submitting l cause, in view of the strength and violence of her assailant or t number of those taking part in the crime, resistance must useless if not perilous;[2] in her yielding through reasonable f of death or extreme injury impending or threatened; in the f that she is rendered senseless and incapable of resistance by toxicating drink or a stupefying drug;[3] in the fact that she is becile or otherwise *non compos*,[4] or that she is a child under age of ten—in which case the law presumes that she is incapa of consenting to this act;[5] in the fact that her will has been c strained, or her passive acquiescence obtained, by fraud, surpr false pretence, or other controlling means or influence.[6]

As to the details of the proof required to establish the offe under the different circumstances of its perpetration, the subj of the testing of the credibility of the prosecutrix, the defen which may be set up to the charge, &c., the student must be ferred to the treatises on criminal law and the authorities ther cited.

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1. It is rather more precise to describe the act as committed *aga* or *without the consent* than *against the will* of the female, since cases rape may occur where the woman, while certainly not consenting, is capable of exercising will at the time. See definition in 2 Bishop, L. § 1115.

2. "If non-resistance on the part of the prosecutrix proceeds mer from her being overpowered by actual force; or from her not being al from want of strength, to resist any longer; or if, from the number persons attacking her, she considered resistance dangerous and ab lutely useless; the crime is complete." 1 Russell, 677. "A cons induced by fear of personal violence is no consent." 2 Bishop, C. § 1125.

3. 3 Greenl. Ev. § 211; 1 Wharton, C. L. 562; 2 Bishop, C. L. § 11 1125, 1126; Reg. *v.* Camplin, 1 C. & K. 746; Com. *v.* Burke, 105 Ma 376; Com. *v.* Beale, 2 Whart. & Stillé, Med. Jur. § 245. It does affect the case that the insensibility or powerlessness be self-induc In some of the States carnal knowledge of an intoxicated female is ma a separate statutory offence.

4. 2 Bishop, C. L. § 1123; Rex *v.* Fletcher, 8 Cox, 131; State *v.* Ta 28 Iowa, 397.

5. 1 Hale, 628; 3 Greenl. Ev. § 211; Stephen *v.* State, 11 Ga. 2 G. O. 14, Dept. of the South, 1866.

6. See 1 Russell, 677; 3 Greenl. Ev. § 211; 1 Wharton, C. L. § 5 2 Bishop, C. L. § 1122; Reg. *v.* Case, 4 Cox, 220; Rex *v.* Stanton C. & K. 415; Walter *v.* People, 50 Barb. 144.

Robbery—*Definition.* Robbery, at common law, is a felonious taking of his property from the person, or presence, of another, by means of violence, or putting in fear.[1] Its nature is well illustrated by comparing it with larceny. Thus it is called by Blackstone[2]—"an open and violent larceny from the person;" and Bishop[3] writes:—"Robbery is a species of aggravated larceny, committed from the person, (or from his immediate presence and custody, deemed in law a taking from the person,) the principal aggravating matter being usually, not always, an assault." And the same author further characterizes robbery as "a mere compound larceny."[4]

The felonious intent. The term "felonious," in the definition of robbery, refers to the sort of criminal intent with which, in this crime as in larceny, the taking must be accompanied, *viz.* the purpose to steal or *animus furandi;* in other words the intention illegally to possess one's self of the property of another without his consent.[5] Thus if a party take forcibly from another an article of property under a *bona fide* belief that it is his, (the taker's,) own, the act is not robbery but a trespass only; but in such case it must clearly appear that the claim of title was an honest one.[6]

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1. Coke, 3 Inst. 68; 1 Hale, 532; 1 Hawkins, c. 34; 4 Black. Com. 242; 3 Chitty, C. L. 801; 1 Russell, 867; 1 Gabbett, 3 Greenl. Ev. § 223; 1 Wharton, C. L. § 846; U. S. *v.* Jones, 3 Washington, 216; Com. *v.* Clifford, 8 Cush. 216.

2. 4 Com. 243. The taking must be by force or a previous putting in fear, which makes the violation of the person more atrocious than privately stealing. For, according to the maxim of the civil law, '*qui vi rapuit, fur improbior esse videtur.*' This previous violence or putting in fear is the criterion that distinguishes robbery from other larcenies." *Id.* Robbery is also 'distinguished from larceny in being a violent or demonstrative act in the presence of the party assailed, while larceny is in general characterized by secrecy, privacy, or fraud.' Mahoney *v.* People, 48 How. Pr. 185.

3. 1 C. L. § 992, (third edition.) In the seventh edition, § 1156, the definition is—"Robbery is larceny committed by violence from the person of one put in fear."

4. 1 C. L. § 1158.

5. 1 Russell, 871; 3 Greenl. Ev. § 227; 1 Wharton, C. L. § 848.

6. See Rex *v.* Hall, 3 C. & P. 409; 1 Russell, 871; 1 Wharton, C. L. § 848, 853. That the taking of property under alleged belligerent rights, that is to say by the authority of a proper military superior in time of war, is not robbery—see Com. *v.* Holland, 1 Duv. 182; Hammon' State, 3 Cold., 129.

The taking. To constitute the taking in robbery, the pro erty must pass into the actual possession of the alleged take although it remain in his possession but for a very brief perio There may be a taking in law as well as in fact;[2] as where t property is not *seized*, but, by force, threats, or other intimidati is *caused to be delivered* to the accused, or to come into his hand So is the taking held to be robbery in law, where it is *pretend* to be, or is given the *form* of, a regular transaction by the offend force or intimidation being however at the same time employe

The property. This may be personal property of any d scription or value. It must indeed possess some value but h much is immaterial.[5] "A penny as well as a pound, forcibly e torted, makes a robbery."[6] The property need not be held the party by right of absolute ownership: it is sufficient if he h in it only such a special property as may arise from its being his legal custody as agent, bailee, or trustee, that is to say a rig of possession, use, &c. Indeed in robbery the essential point to the ownership of the property is, not so much that it shou belong to the person robbed as that it should not belong to t taker.[7]

The person or presence. It is characteristic of robbery th it is an offence as well against the person as against property, t violent harm or wrong done to the individual being indeed t element which gives it its gravity. The term person includes t body and the clothing. It is not necessary that the individu should have been aware that he has parted with his property

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1. 'Any appreciable, though momentary, removal of the article fro the possession of the owner or holder, will be sufficient.' Rex *v.* Lapie 1 Leach, 320. And see 3 Chitty, C. L. 802; 1 Russell, 870.

2. 1 Russell, 871; 3 Greenl. Ev. § 226.

3. 1 Wharton, C. L. § 849; U. S. *v.* Jones, 3 Washington, 216; Rex *v.* Winkworth, 4 C. & P. 444; Rex *v.* Edwards, 6 Id. 521; 2 East, P. C. 711-731, and cases cited.

4. 1 Hale, 533; 1 Russell, 871; 2 East, P. C. 712; Case of Private Britton, G. O. 17 of 1864, (where however the offence is, erroneously, charged as "grand larceny.")

5. Coke, 3 Inst. 69; 2 East, P. C. 707; 1 Gabbett, 582; 3 Greenl. Ev. § 224; Rex *v.* Bingley, 5 C. & P. 602.

6. 1 Russell, 869.

7. Com. *v.* Clifford, 8 Cush. 218; People *v.* Vice, 21 Cal. 345.

ıce he may at the time have been rendered insensible by a ›w or otherwise,[1] or, occupied with the assault, may not have rceived the abstraction of the article.[2]

[t is also not essential that the article, when taken, should be the actual bodily possession of the party: the possession may *constructive* as well as actual, and if the taking be from his mediate custody or charge, or—as it is commonly expressed—*m his presence*, the act, in law, will be equivalent to a taking m the person.[3]

The force, or putting in fear. The employment of force l the inducement of fear may both concur in a case of this me, but proof of either will be sufficient to establish the specific ɜnce.[4] This element is sometimes described as "force actual, constructive;" *actual* force, as it is expressed by Tilghman C. in a case in Pennsylvania,[5] 'being applied to the body;' *con-uctive*, 'operating, by threatening words or gestures, on the nd.' The force may consist in any battery or duress sufficient lisable or overcome resistance,[6] but it must by physical; fraud, instance, will not supply the place of actual violence.[7] The ting in fear may be by a display of superior force or numbers, menace of death or other considerable bodily harm, by in-idating demonstration without words, by threats of destruc-ı or injury to valuable property, &c. The fear, to supply the ce of actual violence, need not amount to great fright or ter-, but the circumstances must be such as to excite a reasonable ›rehension of the danger menaced and to constrain the will.[8]

. See Foster, 128.

. Com. *v.* Snelling, 4 Bin. 379.

. 1 Hale, 533; 4 Black. Com. 243; 2 East, P. C. 707; 3 Chitty, C. L. ; 1 Russell, 873; 1 Gabbett, 583; 3 Greenl. Ev. § 223, 228; 2 Bishop, L. § 1177, 1178.

. The force must be employed before or with the taking. "A *sub-uent* violence or putting in fear will not make a *precedent* taking, ef-ed clandestinely or without either violence or putting in fear, (as a ›eny,) amount to robbery." 1 Russell, 874.

. Com. *v.* Snelling, 4 Bin. 383.

. 3 Chitty, C. L., 804–5; 2 East, P. C., 708; 1 Russell, 871, 875–6; iabbett, 583; 3 Greenl. Ev. § 229.

. See 2 Bishop, C. L. § 1166.

. 3 Chitty, C. L., 803; 4 Black. Com., 243–4; 2 East, P. C .ussell, 874, 879; 1 Gabbett, 582, 587; 3 Greenl. Ev. § 22

Arson—*Definition.* Arson, at common law, is the malicious burning of the house of another.[1] "It is," says Blackstone,[2] "an offence against the right of habitation[3] which is acquired by the law of nature as well as by the laws of society;" or—as it is expressed by Bishop[4]—"though the thing burned is realty, the offence is rather against the security of the habitation than the property in it." Though ordinarily perpetrated under the cover of darkness, the time of its commission,—whether in the day or in the night,—is wholly immaterial.[5] Further, not being a crime against human life, it is not essential that there be any human being in the building at the time it is fired.[6]

The intent. The burning must be *malicious*, that is to say committed with a criminal or felonious intent. Legal malice, as has been heretofore explained, does not mean personal spite or hostility. In arson, therefore, it is not essential that the offender shall be actuated by a purpose to cause loss or injury to any particular individual.[7] The "malice" may be express or implied;

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1. 1 Wharton, C. L. § 825; 2 Bishop, C. L. § 8. And see Coke, 3 Inst. 66; 1 Hale, 566; 1 Hawkins, c. 39; 3 Chitty, C. L., 1121; 2 East, P. C., 1015; 2 Russell, 548; 1 Gabbett, 74.

In Sec. 5385, Rev. Sts., arson is described as the wilful and malicious burning of "any dwelling house or mansion house, or any store, barn, stable or other building, parcel of any dwelling or mansion house."

It is to be noted that, at common law, the burning of "*a barn stored with hay or grain*," though not within the curtilage or neighborhood of a dwelling, is sometimes described as arson. Thus Chitty, (3 C. L., 1121,) defines arson as a burning of "the house or barn of another." And see 1 Hale, 567; 1 Wharton, C. L. § 825, 834.

2. 4 Com. 220.

3. Or, as it is not unfrequently described,—"an offence against the possession." See *post.*

4. 1 Bishop, C. L. § 577.

5. Coke, 3 Inst. 66; 3 Chitty, C. L., 1126; 2 East, P. C., 1021; 3 Greenl. Ev. § 57.

6. "Arson is not necessarily a crime against human life or the personal safety of others. Although the endangering of human life is a frequent consequence of its commission, it is not one of its necessary characteristics. The offence may be complete without the life of any human being having been put in the slightest peril. The probable danger to life is undoubtedly one of the circumstances which aggravates the offence but it does not constitute it." People *v.* Henderson, 1 Park. 563.

7. "The term *malice*, in this case as in many others, does not imply a design to injure the party who is eventually the sufferer, but merely an evil and mischievous intention, however general, producing damage to individuals." 3 Chitty, C. L., 1122.

ss, where the intent is to burn the particular house which d; *implied*, where the burning does not correspond with the e design of the offender—as where the design is to burn the of A, and that of B is actually burned instead,[1] or where ırning has resulted from some other felony or criminal act ı alone was originally contemplated.[2] But where the burn- sults not from such an act but from a mere trespass or negli- , the malice necessary to arson will not be implied.[3]

e burning. There must be an actual burning; an intent rn, not carried out, will not be sufficient. But the burning not involve the entire edifice or any considerable part of the it is enough if it extend to a small portion, how small is terial. And even such portion need not be wholly con- l. To constitute a burning, there need be only some decom- on, wasting, or destruction of the fibre of the wood, or some egration of the stone, brick, or other material; and, in the f wood, though a mere scorching is not sufficient, a char- s all that is required.[4]

e house. The term "house" in the definition of arson at on law includes not merely the dwelling or mansion in ı the occupant has his abode but, in the words of Hale,[5] ut-houses that are *parcel* thereof, though not contiguous to ınder the same roof." The term has a somewhat broader than the term "dwelling-house" in burglary. The house be a habitation, *i. e.* lived in,[6] though, if at the time of the e the occupant and his family chance to be temporarily ab-

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oke, 3 Inst. 67; 2 East, P. C., 1019; 2 Russell, 549; 3 Greenl. 56.

n the familiar principle of law that every man is to be taken to the natural and probable consequences of his acts. See 3 Greenl. 56.

Hawkins, c. 39, s. 5; 4 Black. Com., 222; 1 Gabbett, 74; 1 Whar- L. § 829.

n this part of the subject, see Coke, 3 Inst. 66; 1 Hawkins, c. ; 3 Chitty, C. L., 1120, 1121; 2 East, P. C. 1020; 2 Russell, 548; nl. Ev. § 35; 1 Wharton, C. L. § 826.

P. C., 567. And see the terms of Sec. 5385, Rev. Sts., cited

eg. *v.* England, 1 C. & K. 533; Surman *v.* Darley, 14 M. & W. om. *v.* Barney, 10 Cush. 478.

sent, the quality of the offence will not be changed in law.[1] The most approved test for determining, in a case of doubt, whether a domestic out-building is within such a reasonable proximity as to identify it with the actual residence, in a case of arson, appears to be 'to inquire whether the burning of it would endanger the main structure.'[2]

The ownership or property. Arson being an offence against the possession, and made punishable for the protection of the habitation not of the title, the *person* indicated in the definition need not be the absolute owner of the house but may have in it the special property of a tenant only.[3] And the nature or duration of his tenancy is immaterial, nor will the law inquire into it provided the house is shown to be his private dwelling at the date of the offence. It is thus the legal possession rather than the actual ownership which is to determine whose house the building burned should be alleged and proved to be.

As arson consists in the burning of the house of another, it is clear—and it is so held—that for one to burn *his own* dwelling is not arson at common law.[4]

Burglary—*Definition.* Burglary, at common law, is an unlawful breaking and entering, in the night-time, into the dwelling-house of another, with the intent to commit a felony therein.[5] Like arson, it is an offence, not so much against property as against the peace and security of the habitation, of which Blackstone[6] writes that "the law of England has so peculiar and tender a regard to the immunity of a man's house that it styles it his castle, and will never suffer it to be violated with impunity." The especial significance and aggravation of the crime

1. State *v.* McGowan, 20 Conn. 246; 1 Wharton, C. L. § 835.

2. See 1 Wharton, C. L. § 833; Gage *v.* Shelton, 3 Rich. 250.

3. 3 Chitty, C. L., 1121, 1124; 2 Russell, 551; 3 Greenl. Ev. § 64; 1 Wharton, C. L. § 836.

4. 1 Hale, 568; 2 East, P. C., 1022; 3 Greenl. Ev. § 53; 2 Bishop, C. L. § 12. Such a burning, where resorted to for the purpose of fraudulently securing the insurance, is a statutory arson in some of the States. See 1 Wharton, C. L. § 843.

5. Coke, 3 Inst. 63; 1 Hale, 549; 1 Hawkins, c. 38, s. 1; 4 Black. Com., 224; 2 East, P. C., 484; 3 Chitty, C. L., 1101; 1 Russell, 735; 1 Gabbett, 169; 3 Greenl. Ev. § 74; 1 Wharton, C. L. § 758; 2 Bishop, C. L. § 90; State *v.* Wilson, Coxe, 440.

6. 4 Com. 223.

consists in the fact that the dwelling is invaded in the hours of darkness and repose, when sleep has disarmed the inmates and exposed them to be assailed or despoiled while defenceless and in terror.[1]

The breaking. This may be actual or constructive; that is to say by a direct physical act of force, or indirectly by means of fraud, artifice, intimidation, or conspiracy with an inmate of the dwelling.[2]

Actual breaking. The force here contemplated is merely legal force, not violence. A very slight degree of force is often only required, and the kind of force exerted is quite immaterial. Burglary being a violation of the security of the habitation, the breaking must be of some portion or fixture of the building relied upon for the protection of the dwelling.[3] The term breaking is used in a technical sense; an opening, removing, displacing, &c., of any fastening or customary barrier to entrance, being equivalent to an actual breaking or severing.[4] Thus the breaking, in burglary, may consist in picking a lock, opening a locked door by a false key, turning with an instrument a key left in the door on the inside,[6] prying open a fastened door or window,[5] boring and pushing back an inside bolt, cutting out a panel or making a hole in a door, wall, shutter, &c., cutting through or breaking in a pane of glass,[7] or in simply opening a shut door by raising the latch or drawing back the bolt by turning the handle, or in raising or letting down a closed window-sash.[8]

But gaining access to an interior by means of a barrier left

1. Coke, 3 Inst. 63; 4 Black. Com. 224; 3 Greenl. Ev. § 75; R. *v.* Margetts, 2 Leach, 931.

2. See 2 East, P. C., 485; 1 Russell, 786, 792; 1 Gabbett, 169; 3 Greenl. Ev. § 76; 1 Wharton, C. L. § 765, 766.

3. 2 Bishop, C. L. § 96; State *v.* Boon, 13 Ire. 246.

4. 4 Black. Com., 226; Com. *v.* Stephenson, 8 Pick. 355; State *v.* Boon, *ante.*

5. Otherwise where the locked door is opened by means of a key left in the door on the outside; such a case being analogous to that of a door or window left open. Rex *v.* Alston, 1 Swin. 433.

6. Prying off a portion of the weather-boarding from an out-building, parcel of the dwelling, was held a breaking, in Fisher *v.* State, 43 Ala. 17.

7. See Rex *v.* Perkes, 1 C. & P. 300; Do. *v.* Bird, 9 C. & P. 44; Do. *v.* Robinson, 1 Mood. 327.

8. 1 Wharton, C. L. § 759, 767; 2 Bishop, C. L. § 91.

Further, a breaking may be constructively effected through a conspiracy with a servant or other inmate of the dwelling, by whom a door, &c., is opened to the assailant, or keys are furnished him.[1]

The entering. This is the accompaniment or complement of the breaking, without which the burglary is not effected; a breaking alone does not complete the crime. To constitute an entry, it is not essential that the party should personally enter in the ordinary sense of the word; the least entering of any part of the body, as a hand, foot, or even finger, is sufficient to satisfy the law.[2] Thus, where a party thrusts his hand or a part of his hand through a hole which he has made in a shutter or window and seizes or attempts to seize property; or where, with felonious intent, he puts his arm or hand through a pane of glass which he has broken, for the purpose of unfastening or opening an inner barrier—a legal entering is held to be effected.[3] And so it is said that there is an entering where the foot of the burglar crosses the threshold of the house.[4] Further, to constitute an entering, it is not even essential that any portion of the body should enter the dwelling, provided some instrument, inserted for the purpose of accomplishing the felony, do actually penetrate within it.[5] Again an entry may be effected and a burglary completed by means of an innocent third person; as where a young child is compelled to pass through a small window or aperture broken from without, and instructed to seize and bring out certain articles of property.[6]

What has been said of the breaking of an *inner* door, &c., as well as of *constructive* breaking, applies also to the entering.

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1. 1 Russell, 794; 3 Greenl. Ev. § 77; 1 Wharton, C. L. § 766. In such cases both parties are held equally guilty of burglary.

2. Coke, 3 Inst. 64; 1 Hale, 551, 554; 1 Hawkins, c. 38, s. 3, 7; Foster, 108; 4 Black. Com., 226, 227; 2 East, P. C., 490; 3 Chitty, C. L., 1106, 1108; 1 Russell, 786, 794; 3 Greenl. Ev. § 76, 78; 1 Wharton, C. L. § 774, 775.

3. Gibbon's Case, Foster, 108; Rex *v.* Perkes, 1 C. & P. 300; Do. *v.* Bailey, R. & R. 341; Do. *v.* Davis, Id., 499; Fisher *v.* State, 43 Ala. 17; Franco *v.* State, 42 Texas, 276.

4. 1 Hawkins, c. 38, s. 7; 4 Black. Com. 226.

5. 1 Russell, 795; 3 Greenl. Ev. § 78; 1 Wharton, C. L. § 774; 2 Bishop, C. L. § 92.

6. 1 Hale, 555; 1 Russell, 797; 3 Greenl. Ev. § 78. So "if a man so employs his wife." 7 Dane, Ab., 136.

The time. It is of the essence of burglary at common law that it shall be committed in the night-time, or, as it is termed in the old pleadings, *noctanter*. Both the breaking and the entering must be in the night, or there is no burglary; the two, however, may be on succeeding or different nights.[1] The ancient legal definition of night was the interval between sunset and sunrise; but from a very early date a different signification has been given to the term night-time, as employed in the description of burglary, namely that period of the twenty-four hours during which there is not enough light from the sun—either daylight or twilight—to enable one to perceive and distinguish with reasonable accuracy the features of the countenance of another.[2] Or, as Blackstone[3] expresses it,—"if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary." But the prevalence of *moonlight*, however full and bright, is held to affect in no manner the question whether or not the breaking and entering were committed in the night; the law of burglary recognizing no middle space between night and day.[4]

The place. The scene of burglary at common law must be a *dwelling-house*. This term includes both the place of the actual residence of the occupant of the premises and all such other appurtenant buildings as are properly *parcel* of the main edifice. The dwelling itself must be a permanent structure intended or adapted for habitation and actually inhabited at the time—a building lived and slept in, not merely used as a place of business. It is immaterial, however, if the occupant be *temporarily* absent. Thus burglary, like arson, may be committed in the summer upon a house not then occupied but customarily inhabited as a winter residence. The dwelling includes the entire edifice, embracing a portion not used for purposes of residence—

1. 1 Hale, 551; 3 Chitty, C. L., 1106; 1 Russell, 821; 3 Greenl. Ev. § 75; 1 Wharton, C. L. § 806;

2. Coke, 3 Inst., 63; 1 Hawkins, c. 38, s. 2; 2 East, P. C., 508; 1 Gabbett, 169; 3 Greenl. Ev. § 75; 1 Wharton, C. L. § 807. In view, however, of the uncertainty of the common-law rule, the period has been expressly defined by statute in Great Britain, (by the 7 Wm. 4 & 1 Vic. c. 86, s. 4, as from 9 o'clock p. m. to 6 a. m.,) and in some of our States.

3. 4 Com., 224.

4. 1 Hale, 551; 2 East, P. C., 509; 1 Russell, 820; 3 Greenl. Ev. § 75; 2 Bishop, C. L. § 101.

s, for example, a store or shop under the same roof—provided it e occupied by the occupant of the portion lived in and not by different person. There may, indeed, be distinct dwellings nder the same roof, (as in a case of a tenement house,) as to any ne of which a burglary may be committed,—an instance, how-ver, which does not include a hotel, where the guests being ıore or less transient, the different apartments are not viewed s distinct dwellings but as parts of the dwelling of the landlord. s to *outbuildings*, these are held to be "parcel" of the dwell-ıg, where, being within a reasonable distance of the habitation, ıey are employed for domestic purposes in connection with it—re contributory or ancillary to it, as branches of the domestic stablishment.[1]

The ownership or occupancy. The place must be the welling *of another;* a man cannot commit burglary of his own welling.[2] But here, as in arson, it is not essential that the tene-ıent be lived in by the owner: it is sufficient if it be occupied s a dwelling by a tenant.[3]

The intent. The intent in burglary is to commit a felony, ıat is to say a particular felony, not merely felony in general.[4] ı the great majority of cases the act intended is the commission *larceny.* That the intent has actually existed and impelled e breaking and entering is all that is required to constitute the fence: whether it be executed or not is wholly immaterial.[5] here need not even be an *attempt* to commit the felony; the

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1. On this part of the definition of burglary, see Coke, 3 Inst. 63, 64; Hale, 554–558; 1 Hawkins, c. 38, s. 12, 15; Foster, 76; 4 Black. Com. 5, 226; 3 Chitty, C. L., 1102–4, 1112–13; 2 East, P. C., 491–507; 1 ıssell, 797–819; 3 Greenl. Ev. § 79–81; 1 Wharton, C L. § 781–791; ;o G. O. 29, Dept. of the South, 1865; Do. 5, Dept. of the Platte, 70. It may be noted that neither a tent in a military camp, (com-re 4 Black. Com. 226,) nor a mere warehouse at a military post, can the subject of burglary.

2. 2 East, P. C., 506; 1 Russell, 820; 1 Wharton, C. L. § 805.

3. See Rex *v.* Collet, R. & R. 498; State *v.* Ginns, 1 N. & McC. 586; ɔuston *v.* State, 38 Ga. 166.

4. 1 Russell, 822, 824; 3 Greenl. Ev. § 82; 2 Bishop, C. L. § 113.

5. 2 East, P. C., 484, 509; 1 Russell, 785, 822; 2 Bishop, C. L. § 110. [t is in this point that burglary, (with intent to steal,) differs from *rob-ry* which requires that something be taken." 1 Wharton, C. L. § 812.

mere breaking and entering, with the intent to commit it, completing the crime.[1]

Larceny—*Definition.* Larceny may be defined as—A taking away of personal property from the possession of the owner, without his consent, with intent to appropriate the same. As will be illustrated in proceeding, it is a trespass with a distinctive criminal *animus.*[2]

The taking. This must be (1) an actual substantial taking of some thing by physical force:[3] an attempt to take, or an intention to take not carried out, will not suffice.[4] There must be force because the taking is a trespass, but the amount or kind is immaterial, mere *legal* force being alone requisite. So the force need not be wholly manual or personal; the instrument by which it is exerted being also immaterial.[5] (2) It must include an actual *removal* of the thing from its place; in other words there must be not only a *caption* but also an *asportation* or "carrying away." This carrying away, however, is no more than is reasonably implied in the term *taking*, since it may consist in the slightest removal of the article from the place which it occupied while in the owner's possession. It is never necessary, to complete the removal in law, that the thief should succeed in getting away with the property.[6] (3) The taking must be from the actual or con-

1. In People *v.* Shaber, 32 Cal. 36, it was held that the existence of an intent to commit larceny made the breaking and entering a burglary, although the building contained nothing of which a larceny could be committed—was in fact empty.

2. See 1 Hawkins, c. 33, s. 2; 4 Black. Com., 229; 2 East. P. C., 552, 554; 3 Chitty, C. L., 917; 1 Wharton, C. L. § 862; 1 Bishop, C. L. § 566; 2 Id. § 758.

3. Coke, 3 Inst., 107; 2 Bishop, C. L. § 804.

4. See Reg. *v.* Brooks, 8 C. & P. 295.

5. Reg. *v.* Firth, 11 Cox, 234; Com. *v.* Shaw, 4 Allen, 308, (cases of abstracting gas by secretly attaching a pipe to the main supply pipe of a gas company;) Reg. *v.* White, 6 Cox, 213; 1 Wharton, C. L. § 924. So, the taking may be effected by means of an innocent agent, as a young child employed for the purpose. 1 Hale, 514; 2 East, C. P., 555.

6. Coke, 3 Inst., 108; 1 Hawkins, c. 33, s. 18; 1 Hale, 508; 4 Black. Com., 231; 2 East, P. C., 555; 3 Chitty, C. L., 925, 943; 2 Russell, 5; 3 Greenl. Ev. § 154; 1 Wharton, C. L. § 923; 2 Bishop, C. L. § 794, 795. The removal being completed, the immediate *return* of the property to the owner will not render the act any the less a larceny. 3 Greenl. Ev. § 156; 2 Bishop, C. L. § 796. "The fact that a thief restores an

structive possession of the owner.[1] For one to appropriate property of another which is in his own possession, because of having been committed to him as a bailee, in trust, is not larceny but embezzlement.[2] (4) The taking must be *invito domino*, or without the owner's consent; *i. e.* without his consent to the taking of the article as *property*:[3] he may consent to the transfer of the *possession*, as to a servant or agent for safe-keeping,[4] without affecting the nature of a conversion by the latter, the possession being still constructively and the property wholly his own.[5]

The property. The subject of larceny must be *personal* property, and property of some recognized value. The articles taken, says Bishop,[6] "must be of some value: unless they are, they are not property, and no wrong is commited in taking them." The doctrine of the common law that animals *feræ naturæ*, (including dogs and cats,) were of no value and therefore *nullius bona* and not subjects of larceny, has been very considerably modified by modern statute. The common-law distinction of "grand" and "petit" larceny, based upon the value of the property stolen as being greater or not greater than twelve pence, is only material to be noticed in connection with the subject of the Punishment.

The ownership. Further, to constitute larceny, the article taken must be *another's*. In the first place it must have some owner; must not be property without a legal owner, as wreck, waifs, or estrays, or other property wholly abandoned.[7] But the ownership need not be that of the absolute or general owner, since larceny may be committed by a taking from a bailee or trustee, in whom the law, pending the bailment or other trust, vests a qualified property which is sufficient to constitute him a

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rticle after he has been detected does not wipe out the fact that he stole t." G. C. M. O. 33, Dept. of Texas, 1885. (Gen. Stanley.)

1. 1 Hawkins, c. 33, s. 5; 2 East, P. C. 554; 2 Russell, 5; 3 Greenl. Ev. § 155, 161.

2. See under "Sixtieth Article"

3. 2 East, P. C., 665; 2 Russell, 19; 2 Bishop, C. L. § 811.

4. Or to a person for a mere temporary use not amounting to a bailment. 1 Hale, 506; 2 East, P. C., 555, 564; 2 Russell, 22.

5. See 2 East, P. C., 668; 2 Bishop, C. L. § 813.

6. 2 C. L. § 767.

7. As to the nature of such property at common law, se 1, 96; 2 Wharton, C. L. § 863; 2 Bishop, C. L. § 875, 8

"special" owner as against the thief. As the thing taken must be another's, the owner certainly cannot steal his own property; and so it is ruled that joint owners or tenants in common of personalty cannot steal the same from each other.

The Intent. To constitute larceny, the taking must be accompanied with an intent to appropriate the *property*, (in distinction from the mere possession,) to the personal use of the taker, or at least to deprive the owner of it. This intent is the gist of the crime; in its absence there may be trespass but no larceny. The intent must concur with the taking, and is complete if then entertained though afterwards abandoned. Its existence may be presumed from such circumstances as the fact of the actual conversion of the property, the manner—secret or otherwise suspicious—of the taking or disposition of the articles, the possession, not satisfactorily explained, of the thing or things stolen, the resort to means to avoid arrest or trial, as desertion by a soldier, &c. On the other hand, counter-presumptions may be deduced from such evidence as that the article was taken under a claim of title, that it was designed to be borrowed only, or that it was *found* after having been *lost* by the owner, and converted in ignorance of the real ownership.[1]

The other Offences specified in the Article. These are—"Assault and battery with an intent to kill; Wounding, by shooting or stabbing, with an intent to commit murder;" and "Assault and battery with an intent to commit rape." The second of these offences[2] is merely an aggravated form of the battery first mentioned.

Assault and battery defined. A battery, or assault and battery,—for the two terms are substantially equivalent, every battery including an assault,—is any unlawful violence inflicted upon a person without his or her consent. A threatening of

1. As illustrating the subject of the intent in larceny, see Coke, 3 Inst. 107, 108; 1 Hawkins, c. 33, s. 3; 1 Hale, 54, 506–509; 4 Black. Com., 31, 232; 2 Chitty, C. L., 926, 927; 2 East, P. C., 510, 655–665, 694, 698; 2 Russell, 7, 9, 11, 12, 17, 18, 123; Wills, Circum. Ev., 47–50, 56, 57; 3 Greenl. Ev. § 157, 159, 169; 1 Wharton, C. L. § 883–913; 2 Bishop, C. L. § 840–851.

2. This attempt is in substance made punishable as a specific offence by the British statute of 1 Vic., c. 85, and by similar statutes in several of our States. See Wall *v.* State, 23 Ind. 150.

violence, or attempt or offer to exert force against another will not suffice, since this would be no more than an *assault*—the assault which is only preliminary to a battery. The force employed must be not merely aimed at but must reach the person or his dress; still, though some impact is essential, a mere touching of the body of the party assailed will satisfy the legal definition.[1] It is obvious, however, that a battery, when the expression of a homicidal intent or intent to ravish, will in general be of a vehement character.

Wounding by shooting or stabbing. The English cases fully explain that a *wound*, in the sense of the statutes making punishable batteries of this sort, must consist at least in a breaking or division of the continuity of the skin; that, to constitute a wound, not merely the cuticle but the internal and entire skin of the body must be pierced or broken, and that a scratch is therefore not a wound: that blood should flow is not however held *essential* to complete a wound.[2]

The term "*wounding by shooting*" removes from consideration all the cases of *shooting* at without hitting, which, being merely cases of *assault*, are not in point here where the physical act must consist in a battery. Shooting is, properly, the discharging of a loaded gun, pistol or other fire-arm. It is not absolutely necessary that the arm should be loaded with a ball, bullet, or shot, since the discharge of a gun loaded with powder and wadding only, if fired very close to a person, may inflict a dangerous wound.[3] That the arm was only thus loaded, however, would ordinarily go to indicate the absence of a murderous intent.

"***Stabbing***" may be defined to be the inflicting of an incised wound by thrusting with a pointed instrument, in contradistinction to a cutting made by a sharp-edged instrument, or an injury of any sort done with a blunt weapon.[4]

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1. See 1 Hawkins, c. 62, s. 2; 1 Russell, 751; 3 Greenl. Ev. § 60; 1 Wharton, C. L. § 617; U. S. *v.* Hand, 2 Washington, 437.

2. Rex *v.* Payne, 4 C. & P. 558; Moriarty *v.* Brooks, 6 Id. 686; Rex *v.* Sheard, 7 Id. 846; Reg. *v.* Smith, 8 Id. 175; Reg. *v.* McLoughlin, Id. 635; Rex *v.* Wood, 1 Mood. 278; Rex *v.* Withers, Id. 294; Rex *v.* Becket, 4 M. & Rob. 526.

3. See Rex *v.* Kitchen, R. & R. 95.

4. See King *v.* Weston, 1 Leach, 247; Rex *v.* Oxford, 5 C. & P. 925; 1 Russell, 723.

Intent to kill. This general intent, first specified in the Article, includes both an intent to commit murder, (the intent designated as that of the offence of "Wounding," &c.,) and an intent to commit manslaughter.

Intent to commit murder. This is, properly, a specific intent to murder a particular person, not an intent to commit murder in general.[1] It is essential to the proof of it that it should appear from the testimony that if a killing had resulted from the battery, the same would have been murder in law.[2] It may be evidenced by such circumstances as a declaration of such intent by the accused, his violent conduct at the time of the offence, the use of a deadly weapon, the grave character of the injury inflicted, the existence of previous enmity between the parties, or other motive adequate to account for the act, &c.

Intent to commit manslaughter. This, which is an intent comparatively rarely entertained, may be induced under circumstances of great provocation operating suddenly, or by the passion and excitement incidental to a mutual fight between the assailant and the party attacked. It can be imputed only where the killing, if death had ensued, would have been manslaughter in law. Thus it cannot be deduced where it is apparent from the evidence that the killing would have been justifiable or excusable homicide.

Intent to commit rape. This must appear from the evidence to have been such as that the accompanying battery, if effectuated, would have amounted to the legal crime of rape.[3] It must be inferable from all the circumstances that the design of the assailant, in the battery, was to gratify his passions at all events and notwithstanding the opposition offered—to overpower

1. See Morgan *v.* State, 13 Sm. & M. 242; 1 Bishop, C. L. § 729-731. But in People *v.* Torres, 38 Cal. 141, it is held that if A, intending to murder B, shoots C by mistake and wounds him, he is guilty of assault with intent to murder C.

2. Rex *v.* Mitton, 1 East, 411; Rex *v.* Payne, 4 C. & P. 558; State *v.* Neal, 37 Maine, 468; State *v.* Williams, 3 Foster, 321; State *v.* Reed, 40 Vt. 603; McCoy *v.* State, 3 Eng. 451; Hopkinson *v.* People, 18 Ills. 265; Dains *v.* State, 2 Hump. 439; State *v.* Anderson, 2 Over. 8; Kunkle *v.* State, 32 Ind. 220; Jackson *v.* State, 51 Ga. 402.

3. Charles *v.* State, 6 Eng. 390; 1 Wharton, C. L. § 181; 1 Bishop, C. L. § 731.

resistance by all the force necessary to the successful accomplishment of his purpose.[1] If this design appears to have been once fully entertained in connection with the battery, the fact that the party afterwards voluntarily desisted, or changed his mind, will not affect the result of the proof.[2] The intent will be demonstrated by the character and degree of the violence employed, the language, threats, demonstrations, and entire conduct of the accused, the place, time, and other circumstances of the attempt, &c.

Charge. For the forms of charging the several crimes made punishable by this Article, the student is referred to the Appendix.

Finding. Certain special forms of finding may be noticed as allowable upon military trials had under this Article. Thus, (as remarked in Chapter XIX,) under a charge of murder the court may find guilty of manslaughter only; under a charge for robbery, the finding may be guilty of larceny; under a charge for burglary in which it is alleged that a larceny—the crime intended—was actually committed, the accused may be found guilty of larceny;[3] under charges for murder, manslaughter, mayhem and robbery, the court may convict the accused of assault and battery with intent to commit the crime, or assault and battery only—to the prejudice of good order and military discipline; under a charge for arson, the party may be convicted of an attempt to commit arson—to the prejudice, &c.; under charges for assault and battery with intent to commit murder, manslaughter, or rape, the accused may be found guilty of assault and battery only.[4]

A court-martial cannot properly find an accused guilty of a lesser *degree* of the crime charged,—as guilty of murder in the second degree under a charge of "murder," since,[5]—(as hereto-

1. 1 Russell, 692; 1 Bishop, C. L. § 731.

2. 1 Bishop, C. L. § 733.

3. See 1 Bishop, C. L. § 796, and cases cited.

4. In these findings, the rule of military law that a court, under a charge of a specific offence, may always find a *disorder* included therein, and within the contemplation of Art. 62,) will justify the court where perhaps the strict rules governing common-law verdicts would fail to do so.

5. This irregular finding was made in a few cases during the late war. See G. O. 234, 246, of 1863. But see DIGEST, 341.

fore stated,) the military code does n
specific crimes enumerated in this A

Punishment. The Article concl
junction:—"*and the punishment in a*
than the punishment provided, for th
the State, Territory, or District, in u
been committed."

Construction—"*Shall not be*
ment," &c. These words, in directi
posed by the sentence shall not be les
authorized by the local law,[1] evidentl
punishment shall, (in part at least,) b
thus authorized. Such is certainly t
But the Article, in thus fixing a *mini*
be adjudged by the court-martial, lea
court to *add to* such punishment if it
addition be practicable. Thus, where
alty, the sentence of the court-martia
where the penalty is imprisonment fo
a certain amount, (or both,) the court
pose an imprisonment of at least as
least as large an amount, (or both,) m
such penalty or penalties at will; its
ing without limit except in so far as it
by a principle analogous to that of th
of "cruel and unusual" punishmen
judge, in addition to the penalty p
(whether or not itself enlarged,) a fu
tary character appropriate to the ca
charge, reduction, forfeiture, suspensi
Where indeed the civil statute, in

1. Where the punishment is in fact le
thorized but inoperative. DIGEST, 28.
ments inferior to those provided by the l
unfrequently been disapproved, in cases
be reconvened for the correction of the se
O. 19, Northern Dept., 1864, (larceny;)
(do;) Do. 19, Dept. of Tenn., 1866, (do
1865, (burglary;) Do. 43, Dept. of La.,

2. See Chapter XX.

3. *Ex parte* Mason, 105 U. S. 696.

ishment, fixes a *maximum* and a *minimum* for the same, as where it assigns to the offender confinement in a penitentiary for a term not less than a stated number of months or greater than a stated number of years, the Article will be satisfied by a sentencing of the accused to the *minimum* term thus established, while of course even the *maximum* may legally be exceeded. But where—as is sometimes done—the statute merely establishes a *maximum*, as where it enacts that the offender shall be punished by imprisonment for a term *not to exceed* a certain number of years, or by a fine *not to exceed* in amount a certain sum named, then, as any degree of the punishment within such limit is legal, the court-martial is without any restriction whatever, under the Article, as to the term or amount which it shall impose by its sentence.

"For the like offence." Like means same or similar, and in general the "like" offence in the local statute will readily be distinguished. Where the statute establishes two or more *degrees* of an offence, with different punishments for the several degrees, it will be sufficient for the court-martial to impose the punishment belonging to the degree to which the offence found by it is "like" or corresponds; though, as military law does not recognize degrees of crime, it may of course, in its discretion, impose the punishment belonging to a higher or the highest degree.

"State, Territory, or District." Of these terms, "District" evidently refers to the District of Columbia.

Measure of the Punishment in General. In adjusting the measure of the punishment under the Article, the court-martial, while strictly observing the specific injunction last noticed, and considering—generally—the estimate of the criminality of the offence as indicated by the penalty or scale of penalties assigned to it by the laws of the State, &c., may well also consult, as a guide to assist its judgment, the *United States'* statute, where any exists making punishable the particular offence. Thus, of the crimes enumerated in the Article, murder, arson, and rape are made punishable with death, and manslaughter, mayhem, robbery and larceny, by fine and imprisonment, when committed at sea or in places within the exclusive jurisdiction of the United States' courts.[1]

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1. See Secs. 5339, 5343, 5345, 5348, 5356, 5385, 5456, Rev. Sts. The crime described is indeed not always the common-law offence, and these statutes are not in general to be referred to for *definitions*.

XXIV. THE FIFTY-NINTH ARTICLE.

[SURRENDER TO THE CIVIL AUTHORITIES OF MILITARY PERSONS CHARGED WITH CIVIL OFFENCES.]

"ART. 59. *When any officer or soldier is accused of a capital crime, or of any offence against the person or property of any citizen of any of the United States, which is punishable by the laws of the land, the commanding officer, and the officers of the regiment, troop, battery, company, or detachment, to which the person so accused belongs, are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil magistrate, and to aid the officers of justice in apprehending and securing him, in order to bring him to trial. If, upon such application, any officer refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil magistrates, or to aid the officers of justice in apprehending him, he shall be dismissed from the service.*"

Principle and Purpose of the Article. This provision, which, derived originally from a corresponding British Article, has undergone but a single material change, presently to be noticed, since its first appearance in our code of 1776, proceeds upon certain general principles well defined in our law. Of these, the fundamental principle of the distinctness and independence of the two sovereignties of the United States and of the separate States, as declared by the Supreme Court in Ableman *v.* Booth,[1] has been applied to the relations between the authorities of the States and the U. S. military authorities in the more recent adjudication of the same court in the case of U. S. *v.* Tarble,[2] and specially also in the leading case in Iowa of *Ex parte* McRoberts.[3] But, notwithstanding this independence of the military

1. 21 Howard, 516. In this case Chief Justice Taney observes: "The powers of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court as if the line of division was traced by landmarks and monuments visible to the eye."

2. 13 Wallace, 397.

3. 16 Iowa, 600.

within its peculiar field, the further principle is uniformly
ed of the subordination, in time of peace and on common
d, of the military authority to the civil, and of the conse-
amenability of military persons, in their civil capacity, to
vil jurisdiction, for breaches of the criminal law of the land.[1]
s in recognition of these principles, and to facilitate the
se of such jurisdiction, that this Article has been enacted.
gh in form an injunction upon commanding officers, &c., its
al purpose, as expressed by the court in the case of McRob-
is "to aid the civil authorities in the administration of jus-
nd to place it out of the power of a criminal to escape the
ivil penalties of his acts by entering the military service,
iming its protection while in it." At the same time, by
ibing a condition to be complied with on the part of civil
ls and persons, and investing military commanders with a
able discretion in accepting their applications, it protects
ilitary from false arrest and arbitrary prosecution.

asion of its Operation—Construction of Terms.
occasion upon which the duty specified in the Article is
ved upon the officers indicated, is the application for the
der to the civil authorities of an officer or soldier accused

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ee Dow *v.* Johnson, 100 U. S. 169; *Ex parte* McRoberts, 16
501; Rawle on the Const., 161; Halleck, Int. Law, 393; VI Opins.
n., 415, 417, 451; Tytler, 153; 1 McArthur, 38; DIGEST, 29, 215,

Journals of Congress during the Revolution contain sundry as-
s of this principle. Thus in one case, (2 Jour. 572,) it was Re-
—"That all military officers and soldiers in the service of the
States are, and of right ought to be, amenable to the laws of
ate in which they reside in common with other citizens." In an-
case, (3 Jour. 77,) it is recited that—"Whereas complaint has been
to Congress that brigadier count Pulaski has resisted the civil au-
of this State," (Pennsylvania,) "Resolved that the board of war
uire his personal attendance at the war office; * * * it
he fixed determination of Congress to discourage and suppress
opposition to civil authority by any officer in their service." And
, (Id. p. 79,) the board are "directed to inform brigadier Pulaski
is the duty of every military officer in the service of these States
d obedience to any process issuing from any court, judge, or mag-
within any of the United States." In a third instance, earlier in
2 Jour. 68,) it was Resolved by Congress that a regimental adju-
harged with the murder of a citizen, "be delivered to the civil
ity of Pennsylvania that he may receive his trial

6 Iowa, 603. And see Samuel, 489.

of a criminal offence. The circumstances under which the Article is intended to be operative will appear from a reference to the terms of the provision.

"Any officer or soldier." This designation clearly refers to officers and soldiers under present military command and control.[1] Military persons not within such control, as *persons on furlough or leave of absence*, or deserters, could scarcely have been contemplated. The Article not applying to such parties, it would follow that the civil authorities would be entitled to arrest and bring to justice a person of such class in the same manner as any *civilian*, *i. e.* without application to the military authorities. This was indeed the precise point ruled in *Ex parte* McRoberts already cited—a case of a soldier absent on furlough—in which it is said that such a soldier "is not in the custody or control of his commanding officer, and may therefore be arrested as any other person, and no conflict can arise." The fact that his leave of absence may be recalled 'cannot, it is remarked by the court, affect his status while it continues in force: so long as it is *not* recalled, he remains without the military jurisdiction.'[2] In the further case of Private Rosenback,[3] who, having been arrested, while on furlough, by the civil authorities of Wisconsin, on a charge of murder, in 1864, petitioned the Department Commander to be taken out of the hands of said authorities and tried by court-martial, it was determined by Gen. Pope as follows:—"The petitioner, at the time the crime is charged to have been committed, was on furlough and absent from his regiment in the State in which he enlisted, and was at the time acting in no sense in his military capacity. He was substantially in the same position before the law with any person not in the military service, and equally responsible to the civil authorities for any offence against the laws of the State of Wisconsin. His case is not one which would justify the interposition of the military authorities, and his petition is therefore refused."

"Accused." This word is construed by Samuel[4] as meaning regularly charged on oath before a civil magistrate, as best evi-

1. See G. O. 87, Dept. of the Mo., 1863.

2. As to the *jurisdiction* of a court-martial over an offence committed by an officer or soldier on leave or furlough, see Chapter VIII.

3. G. O. 29, Dept. of the Northwest, 1864.

4. Page 491.

denced by the warrant of the latter or some other process issued by him. This construction is supported by the fact that the Article provides in terms for the delivery of the accused person "to the civil magistrate" and for his apprehension by "the officers of justice," as if it were contemplated that a judge or justice should issue a writ or summons requiring the party to be brought before him, and a sheriff or constable should be present to serve it. Such indeed would be the regular course of proceeding, and one advisable in general to be pursued before a surrender is applied for under this Article. Nothing *more* certainly can be required; an indictment, for instance, can never be necessary. The proceeding indicated, however, is not *essential;* the term "accused" is not necessarily to be construed in a technical sense; and a specific charge of an offence contemplated by the Article, formally made in the "*application*," may be accepted as sufficient in the absence of legal process.[1]

"A capital crime." These words are considered to be qualified, equally with those which follow, ("any offence," &c.,) by the words "punishable by the laws of the land." The capital crime here intended is thus properly a crime made punishable with death[2] by the laws of the State, &c., in which it was committed.

"Any offence against the person or property of any citizen of any of the United States." Here are evidently intended crimes, other than capital, involving violence against the person, as manslaughter, mayhem, robbery, and assault and battery, together with such as affect a person in his property, as burglary, larceny, forgery, embezzlement and malicious mischief. Offences against society or the public, and offences against government, (except where immediately affecting individual persons or their property,) could scarcely have been contemplated.

The term "*citizen*" as used in this clause may be deemed to apply to a military person equally as to a civilian. Such a person, however, would rarely have recourse to proceedings under

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1. In Jeffers' case, (II Opins. 15,) Atty. Gen. Wirt does not intimate that the issuing of a warrant is *necessary*.

2. As to the definition of the term "capital" as employed in the Articles of war, see Chapter XVIII—"Testimony by Deposition."

this Article where the offence committed against him was one cognizable and adequately punishable at military law.[1]

The description "*any one of the United States*" may also be taken in a general sense, and be deemed to apply, in spirit at least, to Territories as well as to States.[2]

"Punishable by the laws of the land." The term "laws of the land" has been construed in a series of adjudged cases, and uniformly explained to mean acts of the law-making power, that is to say statute law of the State, (or Territory,) in contradistinction to municipal ordinances, by-laws, or regulations of police.[3] The minor derelictions to which penalties are attached by the latter are clearly not intended to become the subject of accusations under the present Article, but only such offences as are made punishable by the general criminal code.

The fact that the crime against the State may also constitute or involve a military offence punishable by the military law cannot affect the right of the citizen, (or of the public,) to initiate proceedings under the Article.[4]

The right, it may be added, continues until the prosecution for the offence becomes barred by the civil statute of limitations and the offence is thus no longer "punishable." That the offence was committed by the accused before he entered the military service cannot impair the exercise of the right, provided the civil limitation has not taken effect.[5]

It is to be added that, where the crime or offence of the officer or soldier was committed within a military reservation or other locality, over which, by the cession of its jurisdiction by the State or otherwise, *exclusive jurisdiction* is vested in the United States,

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1. "In ordinary cases, the party injured, if he be himself of the army, either as officer or soldier, will consider that the rights and the interests of the service are injured in the injury done to himself, and will prefer to have the guilty party dealt with by military law, and will not seek to have the civil magistrate interpose." VI Opins. At. Gen., 426.

2. The Article is not intended to apply to cases of offences committed against the laws of the *United States*. See DIGEST, 30, 31.

3. Vanzant *v.* Waddell, 2 Yerg. 270; State Bank *v.* Cooper, Id. 605; Horn *v.* People, 26 Mich. 228; Greene *v.* Briggs, 1 Curtis, 311, 325; *Ex parte* Bright, 1 Utah, 145; State *v.* Pollock, A. & N. Jour., Sept. 15, 1877; Kalloch *v.* Superior Court, 56 Cal. 229; DIGEST, 30.

4. VI Opins. At. Gen., 415, 416. See *post* as to concurrent jurisdiction.

5. G. O. 29, N. West, 1864; DIGEST, 30.

the Article does not apply; the criminal act not being one "punishable by the laws of the land," as the term is there employed. In such a case, if deemed expedient that the accused be tried by a civil tribunal, the military authorities will concur with the U. S. Marshal and District Attorney with a view to his trial before the U. S. District Court.

Form of Proceeding. The Article requires that, to obtain the surrender of the accused by the military authorities, there shall be an "*application duly made by or in behalf of the party injured.*" The application, which should be in writing, will properly set forth that a specific offence named, of the character indicated in the Article,[1] has been committed, or is charged and believed to have been committed, by a certain officer or soldier of the command, and that his delivery to the civil authorities is required with a view to his trial, or in terms to such effect.

The application will regularly be subscribed and presented by the party himself, or, for him, by an authorized representative. Where the application is not personal, the commander should satisfy himself that it is made by the authority or with the acquiescence of the injured party, (if living,) and not as the gratuitous motion of a mere stranger. It is observed by Attorney General Cushing that a civil magistrate has no authority *as such* to demand the accused; the law giving him no "right of voluntary and officious interference in these matters;"[2] he cannot therefore, it is added, make the requisition, "unless moved so to do by the party injured."[3] In a case of *homicide*, however, where there can be no personal application, "the entire society," says Mr. Cushing in the same opinion, "is the party injured;" and "the public prosecutor or grand jury," as taking the place of the party

1. "It is not enough to tell him" (the commander) "that *some* offence has been committed; he must know what the specific offence is in order that he may see whether it is an offence 'punishable by the known laws of the land.' The application, according to the Article, must be duly made to him; and, in my opinion, no application is duly made, which does not state the specific offence so as to enable the commander to see distinctly that the case contemplated by the Article has arisen." Atty. Gen. Wirt, II Opins. 14–15. And see Samuel, 492; DIGEST, 29.

2. VI Opins., 421.

3. Id., 426; State *v.* Pollock, *ante.*

and representing the public, may properly make the demand:[1] or it may be made by any private person, since, in such a case, "it is the right of any and of every citizen to move the courts of the country to apply the laws of the land to the criminal."[2]

Whether or not, however, the application be "duly made" is a matter wholly within the discretion of the military commander to determine. If he thinks proper,—as where the original form is not sufficiently explicit, or he is not assured that it is presented in good faith,[3]—he may require it to be made more specific,[4] or to be sworn to, or to be supported by the affidavits or statements of other and credible persons, or to be accompanied by a warrant of arrest.[5] On the other hand, under circumstances justifying it, as in a time of emergency, or where the facts are notorious or fully within his own knowledge, he may dispense with a formal application or even accept an oral one. So where a warrant has been duly issued and is duly tendered, he may accept the same as made in behalf of the injured party, and as constituting of itself a satisfactory and sufficient application within the purview of the Article.

Illegality of Arrest or Surrender without due Application made. The application, says Cushing,[6] "is the necessary antecedent condition of the right of the civil authorities to act." So, in the case of McRoberts,[7] it is held by the court that, in view of the enactment of Art. 59, "it becomes the duty of the civil officer to stop at the boundary line between the two jurisdictions, and there demand of the military officers the delivery of the accused. * * * The soldier, while he continues in the actual military service, cannot be arrested on civil process except in the manner provided by the Article." It follows that when an ar-

1. VI Opins., 422.
2. Id., 426. And see Hough, 224.
3. See VI Opins., 423, 428.
4. See II Opins. At. Gen. 5.
5. See Samuel, 492.
6. VI Opins., 421.
7. 16 Iowa, 603, 604. But the fact that the arrest is actually made without the proper application cannot affect the jurisdiction of the State court in the case. *In re* O'Connor, 37 Wisc. 379.

st is made without a previous demand, or after a demand not ıly made in accordance with the Article and therefore not ac-ded to, the law is violated, the act is a trespass, and it is the ght as well as the duty of the commander, (who owes it to his mmand to protect them from illegal seizure,[1] and to the United ates to maintain its just authority,) to retake the prisoner from e custody of the civil officials and remand him to his former atus.[2] In so doing the commander is entitled and properly re-ıired to employ such military force as may be suitable and suf-ient to effect such purpose in an orderly manner. It need ırdly be remarked that the law is quite otherwise where the offi-r or soldier has become chargeable with a misdemeanor or dis-derly conduct in violation of a city ordinance or police regula-on. Here, as already indicated, he may be apprehended where und, and tried and punished, without previous recourse to the ilitary authorities, nor are the latter authorized to interfere with e due course of law in his case.[3]

It may be added that while the civil authorities cannot legally rest, nor the military authorities properly surrender, an accused ficer or soldier except as provided in the Article, so, such ac-sed person cannot in general properly be allowed voluntarily surrender himself. However willing and ready he may be to eld to the course of civil justice, it is not for him to decide ıether it is proper for him to do so, but for the commander one. He should therefore await due proceedings under the rticle and the orders of his commander thereon.[4] If indeed the cused party does, of his own motion, actually appear before the agistrate and submit himself to the civil authority, his act gives the latter the legal custody of his person, and his commitment, default of bail, will be a legal and regular proceeding.[5]

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1. "The commanding officer owes a duty to the men under his com-ınd—he owes them the duty of protection, so long as they continue the faithful discharge of their duty. This duty is first in point of ıe, and highest in point of obligation. This Article gives him no thority to withdraw that protection and deliver over his men to others, cept in the case which it describes." II Opins. At. Gen., 14.
2. See *Ex parte* Bright, 1 Utah, 151; DIGEST, 29.
3. DIGEST, 30.
4. DIGEST, 31.
5. See VI Opins. At. Gen., 422.

Duty and Liability of Officers under the Article. The duty imposed by the Article upon commanding officers and the officers under them,[1] is required of them in all cases except such as may arise *in time of war*. This exception, first introduced into the Article in 1874, was doubtless suggested by the fact that by the provision of the Act of March 3, 1863, now incorporated in the code as Art. 58, a special jurisdiction, concurrent with that of the courts of the States, &c., had been conferred upon military courts, *in time of war, &c.*, for the trial of the principal crimes made punishable by the general criminal law.

The requirement that officers shall use their "utmost endeavors," &c., is of course to be understood in a reasonable sense and with reference to the circumstances of the particular case.[2] Thus if the accused person is not within military control because absent as a deserter or on furlough, nothing more can in general be required of the commander, &c., than to furnish to the civil authority such information in regard to his present whereabouts and the prospect of his return as may be possessed.

If the accused, having been once duly delivered to the civil official, escapes and returns to his military station, he is not to be brought to trial by court-martial as for a military offence, but should properly be remanded to the civil authorities, or held subject to a renewed application by them for his surrender.[3]

As the commander, &c., is required by the Article "to aid the officers of justice" not only in "apprehending" the accused, but also in "securing him," he should properly furnish such officers, when they are not supplied with an adequate police force, with a guard of soldiers sufficient for the purpose of safely conducting the prisoner to his destination.

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1. That the duty is mainly devolved upon the *commanders*, the province of inferior officers principally being to carry out their orders—see Samuel, 490–493; Hough, 221–224; Clode, 98; O'Brien, 119–120; II Opins. At. Gen., 14. It is remarked by Mr. Wirt, in the opinion last cited, that the Article is "entirely inapplicable to the *President*," and that no demand can be made upon him under it. And see 1 Opins., 244.

2. See Samuel, 493; O'Brien, 119–120. Hough, (p. 224,) in construing the term "utmost endeavors," says:—"Therefore concealing or harboring the accused, or giving him the means of escape, or aiding or in any manner assisting therein, or conniving at or even advising such escape, would be criminal acts, and * * * would amount to the not using the best endeavors."

3. G. O. 7, Dept. of the South, 1871; DIGEST, 31.

Prior assumption of Military Jurisdiction as affecting the interposition of the Civil Authorities. Where a civil and a military court have concurrent jurisdiction of an offence committed by a military person, the court which is the first to take cognizance of the same is entitled to proceed;[1] and although the precedence of the civil jurisdiction is favored in the law, yet if this jurisdiction does not assert itself until the other has been duly assumed in the case, its exercise may properly be postponed until the other has been exhausted. Upon the commission of such an offence, the military authorities will in general properly wait a reasonable time for the civil authorities to take action;[2] but if, before the latter have initiated proceedings under the Article, the party is duly brought to trial by court-martial for the military offence involved in his act, the commander may, and ordinarily will, properly decline to accede to an application for his surrender to the civil jurisdiction until at least the military trial has been completed and the judgment of the court has been finally acted upon.[3]

XXV. THE SIXTIETH ARTICLE.

[FRAUDS, EMBEZZLEMENT, &C.]

"ART. 60. *Any person in the military service of the United States who makes or causes to be made any claim against the United States, or any officer thereof, knowing such claim to be false or fraudulent; or*

Who presents or causes to be presented to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof, knowing such claim to be false or fraudulent; or

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1. VI Opins. At. Gen., 414; DIGEST, 31.

2. It is indicated in *Ex parte* Mason, 105 U. S. 699, that where the civil authorities do not presently apply for the accused under the Article, it is the *duty* of the military authorities to proceed to exercise their jurisdiction.

3. See remarks of Atty. Gen. Cushing in Steiner's Case, VI Opins. 23, and in Howe's Case, Id., 513–14; also DIGEST, 31.

Who enters into any agreement or conspiracy to defrau United States by obtaining, or aiding others to obtain, the a ance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtai approval, allowance, or payment of any claim against the U States or against any officer thereof, makes or uses, or procu advises the making or use of, any writing, or other paper, kno the same to contain any false or fraudulent statement; or

Who, for the purpose of obtaining, or aiding others to obtai approval, allowance, or payment of any claim against the U States or any officer thereof, makes, or procures or advises the ing of, any oath to any fact or to any writing or other paper, k ing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtai approval, allowance, or payment of any claim against the U States or any officer thereof, forges or counterfeits, or procu advises the forging or counterfeiting of, any signature upon writing or other paper, or uses, or procures or advises the u any such signature, knowing the same to be forged or counte ed; or

Who, having charge, possession, custody or control of any m or other property of the United States, furnished or intende the military service thereof, knowingly delivers, or causes delivered, to any person having authority to receive the same, amount thereof less than that for which he receives a certifica receipt; or

Who, being authorized to make or deliver any paper certi the receipt of any property of the United States, furnished o tended for the military service thereof, makes, or delivers to person, such writing, without having full knowledge of the of the statements therein contained, and with intent to defrau United States; or

Who steals, embezzles, knowingly and willfully misappropri applies to his own use or benefit, or wrongfully or knowingly or disposes of any ordnance, arms, equipments, ammunition, c ing, subsistence stores, money, or other property of the United St furnished or intended for the military service thereof; or

Who knowingly purchases, or receives in pledge for any obl tion or indebtedness, from any soldier, officer, or other person is a part of or employed in said forces or service, any ordna

arms, equipments, ammunition, clothing, subsistence stores, or other property of the United States, such soldier, officer, or other person not having lawful right to sell or pledge the same,

Shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge. And if any person, being guilty of any of the offences aforesaid, while in the military service of the United States, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court-martial, in the same manner and to the same extent as if he had not received such discharge nor been dismissed."

The Original Act. This statute, which, as an Article of war, appears for the first time in the revised code of 1874, consists of secs. 1 and 2 of the Act of March 2, 1863, c. 67, entitled "An Act to prevent and punish frauds upon the Government of the United States." In transferring the statute to the Revised Statutes, the several provisions have been condensed and simplified but no material change has been made.

The legislation of 1863 was intended to bring to punishment a numerous class of frauds which the experience of the war had already shown to be likely to be committed during such a period in connection mainly with claims upon the Treasury, official accounts, and the disposition and custody of the public moneys and other property of the United States. Enacted mainly with a view to the circumstances of the existing state of war, the provisions of the Act were nevertheless general in terms, and thus have survived to the present time.

The Act, which was of a comprehensive character, provided not only for the trial of military and naval persons charged with the offences specified in the first section, but also for the prosecution, both by *qui tam* action and criminal proceedings, of civilians similarly accused. Its provisions, as set forth in the present Article, are also embraced in the Fourteenth of the Articles for the Navy, and, as constituting a part of the general penal law applicable to civil offenders, are to be found contained in Secs. 3490–3494, 5438 and 5439 of the Revised Statutes.

The separate paragraphs of the Article will be briefly considered; the *ninth* only, as the most comprehensive and important, being dwelt upon more at length.

The First Six Paragraphs. These relate to fraud claims against the United States,[1] including the making senting,[2] &c., of any such claims; the entering into corrupt a ments and combinations to defraud the government by the ecution of such claims; and the making, using, &c., of writings, the forging, &c., of signatures, and the taking, & false oaths, for the purpose of obtaining the payment or ap of such claims. It will be observed that it is not necess constitute an offence under any of these paragraphs th fraudulent claim should have actually been induced to be p even *allowed* on the part of the United States.

Paragraphs 1, 2 and 4.—*Fraudulent claims for cers' pay.* It is under these paragraphs that charges f tempts by officers to secure double or repeated payments offence familiarly known as the *duplicating* of pay rolls— been frequently laid.[3]

Thus, where an officer who has sold his claim for pay certain month, and assigned the pay rolls or accounts, which the evidence of the right to receive the same, to a banker, c itor, or other party, subsequently himself presents, (or cause be presented for him, by an attorney, a military subordinate other person,) to the paymaster, a personal claim for the sam

1. In the description of these claims as claims "against the United States *or any officer thereof*," the concluding words are without significance and surplusage. A claim against an official, (as such,) or department, of the government is necessarily a claim against the United States. The statute does not contemplate *personal* claims upon officers.

2. That making and presenting are distinct offences under this statute, so that the making of a false claim may be completed in a distant State while the presenting of the same may be committed at Washington, D. C.,—see *Ex parte* Shaffenburg, 4 Dillon, 271.

3. DIGEST, 33. And see instances in G. C. M. O. 219 of 1865; Do. 56 of 1867; Do. 61, 72, of 1869; Do. 11, 22, of 1870; Do. 42, 57, of 1874; Do. 25, 50, 104, of 1875; Do. 37 of 1876; Do. 40 of 1878; Do. 32, 45, 62, 63, of 1883; Do. 8, 9, of 1884; Do. 23 of 1885. The opinion has already been expressed that this offence is not properly laid under Art. 13, which is viewed as referring to the signing of a certificate for the pay not of the signer but of some other officer, &c. The offence, however, is sometimes, and properly as it involves a dishonor, (see G. C. M. O. 28 of 1872; Do. 59 of 1875,) charged as a violation of Art. 61; also, less frequently, as conduct prejudicial to discipline under Art. 62. Where a pay account is transferred before the pay is due, the officer is chargeable under the last named Article for a violation of par. 2380 of the Army Regulations. (See G. C. M. O. 28 of 1872.)

pon a new set of accounts, he is clearly chargeable with the :e set forth in the 1st and 2d paragraphs, since the claim made and presented must, as well as the second set of ac- s, necessarily be false and fraudulent. Where indeed the ıal transfer is not absolute or unconditional, but by way of eral security only, and is upon the condition that the as- : shall not present the claim without the express authority : officer, but the same is improperly treated by the assignee absolute property, and, without the knowledge of the offi- presented by and paid to the assignee; or where the officer, : accounts first transferred, has substituted, or made arrange- ; to substitute, other security, and has supposed that these nts have accordingly been cancelled;[1] these, or other facts, ıting that the personal presentation was made in good faith, :onstitute a defence to a charge against the officer for pre- ıg the second set of accounts. But, especially in view of ct that the Army Regulations, par. 2380, forbid the assign- of pay before due in any case,[2] all such defences should be :ained with great caution by military courts, and unless it y appear that the accused, when he presented the claim, had such precaution that he knew, or was fully and reasonably :d, that no other presentation had been or would be made, efence should not be accepted as sufficient.[3]

ain, an officer who, having once drawn or sold his pay for a n month or months, signs and transfers further pay rolls for me, is chargeable with the offence specified in the 4th par- ı, since the rolls contain a "statement" known to him to :e and fraudulent, *viz.* the statement, in the printed cer- , that the amount charged in the account is "correct and and is "rightfully due" him.[4]

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e G. C. M. O. 28 of 1872.

G. O. 35 of 1829, it is said of this regulation, (referred to as an f June, 1827,) that its effect was "to remove all pretences of and defence on the ground of mistake and accident."

:e remarks of Secretary of War in G. C. M. O. 45 of 1883.

:e a late instance of this offence in G. C. M. O. 52 of 1877; also, 25 of 1875, a case of a false statement on a pay account that the had served ten years. And see instances of false statements or ates, in connection with claims other than for pay, in G. O. 18 of G. C. M. O. 152, 614, of 1865; Do. 47 of 1870. [The three last ses of false certificates furnished *contractors* in support of fraud- claims by them to be paid under contracts not duly executed.]

Other included claims. Under these three paragraphs also are properly laid charges based upon the knowingly making, &c., of a variety of other fraudulent claims against the United States. Thus the General Orders contain cases of charges under this Article for the presenting by officers of false claims for disbursements to government employees,[1] for disbursements in the secret service,[2] for horses lost in battle,[3] for recruiting expenses,[4] for transportation of public stores,[5] for pay of soldiers on falsified muster rolls,[6] for fuel for a detachment,[7] &c.; also claims by soldiers for pay upon falsified discharges and final statements,[8] claims for the reward for the arrest of deserters who have not in fact been apprehended,[9] &c.[10]

Guilty knowledge the gravamen of the offence. It is not the object or purpose of the party in the transaction, but his *knowledge* that the claim is false or fraudulent[11] which is made

1. See G. C. M. O. 303, 605, of 1865; Do. 2 of 1868.

2. G. O. 74 of 1864.

3. G. C. M. O. 406 of 1865.

4. G. O. 67 of 1864; G. C. M. O. 131, 241, of 1864; Do. 293 of 1865; Do. 208 of 1866. And see, in this connection, cases of Langenbach, contractor, (G. C. M. O. 181 of 1864,) tried by court-martial for presenting fraudulent claims for subsistence and lodging furnished to recruits; and Johnson, government agent, (G. C. M. O. 191 of 1864.) tried by military commission for presenting similar claims for the expenses of the care of sick and wounded soldiers and prisoners, at New York.

5. See G. C. M. O. 35 of 1872.

6. G. C. M. O. 53 of 1870. And see case in Do. 395 of 1865.

7. G. C. M. O. 20 of 1868.

8. G. C. M. O. 639, 644, of 1865; Do. 39, 101, of 1866; G. O. 46, Dept. of the East, 1869; G. C. M. O. 55, Id., 1871; G. O. 16, Middle Dept., 1865.

9. G. C. M. O. 45, 46, Dept. of the East, 1872.

10. A recent case is that of the presenting of a fraudulent claim for the services of a telegrapher at a signal station. G. C. M. O. 61 of 1880. So, of a printer. G. C. M. O. 1 of 1883. A form of fraudulent claim, where the fraud consists in an altered and false statement, is that made by reporting on a clothing account a sum as due which is greater than the actual amount. G. C. M. O. 26 of 1883. And see a similar case in Do. 48 of 1879.

This part of the statute is not restricted to the presenting of claims by a party in his own behalf, but extends to claims presented in behalf of another person. U. S. *v.* Hull, 4 McCrary, 274.

11. There is little distinction between a claim that is false and one that is fraudulent, and no significance is attached to the use of the disjunctive "*or*" in this connection.

by the Article the gist of the offence. If he knew, or the circumstances of the case were such as properly to charge him with the knowledge, that the claim was a fictitious or dishonest one when made or presented, &c., he is amenable to trial under this part of the Article; otherwise not. Where an officer presented his pay account and received his pay thereon without having been notified of a sentence of court-martial by which he was dismissed and his pay forfeited, he was held by the Judge Advocate General not to be chargeable with the offence of knowingly making a false or fraudulent claim under this Article.[1] So the mere filling out and signing of a pay account before the pay has become due does not constitute such an offence. An officer, for example, when required to absent himself from his post, may properly sign and leave with his family a form or forms of account for certain pay, before the same becomes payable, as a provision for their support during his absence: here, the design being that the account shall be presented only when it falls due, a knowingly making of a false claim cannot be ascribed.[2]

Paragraph 3. The offence here described is the entering into an *agreement or conspiracy* with a view to defraud the United States, by inducing the payment by it of a false or fraudulent claim. It will consist in such acts as the signing or approving of untrue certificates, vouchers, accounts, &c.; the procuring of such writings, by means of misrepresentation or deceit, to be approved by superior officers; the procuring false receipts, vouchers or statements to be signed by third parties, &c.,—pursuant to a collusion with one or more persons, and with fraudulent intent as above. A familiar illustration would be a conspiracy, between an officer (or soldier) on the one hand and a government contractor or other civilian on the other, to defraud the United States, to their mutual benefit, by means of falsified vouchers indicating the delivery by the latter of supplies not in fact furnished,[3] false accounts for recruiting expenses,[4] or other spurious claims.[5]

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1. DIGEST, 33.
2. See G. C. M. O. 28 of 1872.
3. See cases in G. C. M. O. 11 of 1872; G. O. 8, Dept. of Cal., 1872; also cases in G. C. M. O. 4, 6, of 1873, where, however, the offence is not charged under the present Article.
4. See cases in G. O. 18 of 1864; G. C. M. O. 131 of 1864.
5. See cases in G. C. M. O. 152, 614, of 1865; Do. 47 of 1870.

Paragraph 5. The making of the false oath here indica though not of course perjury at common law, (which is the ing of such an oath in a judicial proceeding or course of justi may properly be regarded as assimilated to that crime in s of its requisites.[2] Thus the oath, as in perjury, should be to s material point,—that is to say, here, to some writing or stater in whole or in part pertinent to the proof or prosecution of claim presented,—and should be taken before a magistrat other civil official legally authorized to administer an oath.[3] the same may be said as to an oath *procured to be made* by other, the procuring of the making of a false oath being as ilated to subornation of perjury.[4] As to the further offenc the *advising* of the making of a false oath, it may be added "advises" is evidently to be construed like the same wor Art. 51, being related to the term "procures" much as i there related to the term "persuades."[5]

Paragraph 6. Here the expressions "forges or counterfei "forging or counterfeiting," &c., are evidently intended tc clude any fraudulent making of the signature of another per whether the same be or not imitated; the word "counterfeiti pointing rather to a simulation of the handwriting, while general term "forging" embraces any form of false writin the name.[6]

While this paragraph, in common with the two which preced employs the general description—"any writing or other pap yet, as the purpose of the forgery, &c., must be to obtain th lowance or payment of a claim against the United States, prosecution, as in a case of forgery at common law, shoul

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1. 2 Bishop, C. L. § 1015.

2. It may also be assimilated, in like particulars, to the statu perjury made punishable by Sec. 5392, Rev. Sts.

3. Such an oath taken before an officer of the army would be u thorized and of no effect,—except possibly in a rare case of a clai account of property destroyed, damaged, &c., in the service, when s an oath might be legal under par. 1752, Army Regs.

4. That subornation of perjury is but another form of perjury, s Bishop, C. L. § 1056, 1197. And see Sec. 5393, Rev. Sts., by wl subornation of perjury is made punishable precisely as is perjury.

5. See Fifty-First Article, *ante*, p. 936.

6. Compare definitions of forgery in 1 Wharton, C. L. § 653 Bishop, C. L. § 523.

:pared to prove that the falsified signature is upon a paper ich is material, or which appears on its face to be material, to : proof of the claim, so as to be capable of effecting or con- ɔuting to effect some fraud in connection with it.[1] The writings papers mainly had in view in the paragraph are the usual ıchers, certificates, returns, accounts, rolls, final statements, ;criptive lists, &c., the completion of which by the signature the person interested, or of the officer whose formal authenti- ion is required, is essential to the substantiation of a claim for ', &c.[2]

To establish a charge under this paragraph, it should of course ɔear that the accused made, &c., the signature alleged to be ged or counterfeited, wholly without the authority of the per- ı whose name it is, since if any authority to sign it existed, : specific offence would not be committed.[3]

As has already been observed to be the fact with regard to this ss of offences in general, no fraud upon the United States need ually be consummated in order to complete the offence speci- l in this paragraph. Here, as in forgery at common law, the re making of the false signature with the illegal purpose con- :utes the crime; the contemplated wrong need not have been :cted, nor need the forged writing have been uttered or used.[4]

:n the present instance indeed the *using* of the forged signature nade a separate specific offence: in the majority of the cases : two offences—the forging, &c., and the knowingly uttering— ;e generally both been committed by the accused:[5] the latter :nce, however, is complete whether the falsification of the sig- :ure was the act of the accused or some other person.

As to the further offences specified, of *procuring*[6] and *advising*

. See 2 Bishop, C. L. § 524, 533.

. See cases in G. O. 181 of 1863; G. C. M. O. 1 of 1883; DIGEST, also the case of the forging by a soldier of an officer's name to a ck on the U. S., in G. C. M. O. 46 of 1884.

. See 2 Bishop, C. L. § 579.

. 2 Bishop, C. L. § 602.

. See the cases in G. O. 336 of 1863; Do. 67 of 1864; G. C. M. O. , 395, of 1864; Do. 395 of 1865; Do. 39 of 1866; Do. 56 of 1867; Do. of 1870; Do. 27 of 1872.

. In G. C. M. O. 605 of 1865, is published a case of an officer con- :ed of an offence of this class, in procuring a corporal to forge upon ay roll the names of twelve persons as government employees, with iew of substantiating a fraudulent claim for an amount of money as

the forging, &c., of the signature, or its use when forged, &c., the remarks will be applicable which have already been made in regard to the similar forms of the offences designated in the previous paragraphs.

Paragraph 7. The act here made criminal is, in substance, the paying out of public money, (or delivering of other public property,) to the person authorized to receive it, in a less amount however than is actually due him, and taking a receipt from him for the whole amount to which he is actually entitled. The criminality of the act consists, in general, in the illegal withholding from such party of the difference between the sum or quantity paid or delivered and the face of the receipt, and the converting of such difference to his own use, by a disbursing or other officer, who, by the transaction, is also enabled to obtain credit with the United States for a larger amount than has actually been expended by him.[1] While the proceeding may be collusive, the act is ordinarily effected by deceiving the employee, &c., as to the sum or quantity really due him, and causing him to sign a blank or falsified receipt therefor.[2] The criminal nature of the offence is illustrated by a reference to Sec. 5483 of the Revised Statutes, by which an officer, charged with the paying out of any moneys appropriated by Congress, who pays to a government employee a sum less than that provided by law, while requiring him "to receipt or give a voucher for an amount greater than that actually paid to and received by him," is declared to be guilty of *embezzlement*, and directed to be fined in double the amount so withheld from the employee, and imprisoned at hard labor for two years.[3]

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pay due them. In Do. 53 of 1870 is a further case of an officer's procuring an enlisted man of his command to falsify the company rolls by entering the name of a deserter thereon, preparatory to presenting the roll for payment and drawing the deserter's pay.

1. See DIGEST, 33 § 5.

2. See cases in G. C. M. O. 196 of 1864; Do. 35 of 1872. In a case in Do. 52 of 1873, the offence was committed by an A. A. Q. M., in turning over public property to his successor. And compare case in Do. 31 of 1869, charged, however, under Art. 61. In a case in Do. 37 of 1877, a form of the offence was committed by causing a contractor to sign a receipt for a greater amount than was due him, formally paying him the full amount, and thereupon receiving from him the balance which was then appropriated. And compare similar case in G. C. M. O. 37 of 1877.

3. See case in G. O. 63 of 1852. And note Sec. 5496, Rev. Sts., by

Paragraph 8. This paragraph makes punishable the giving by an officer, &c., of a receipt, known by him to be false or not known by him to be true, for property as duly delivered for public use in the military service—"with intent to defraud the United States." The act indicated is commonly a collusive transaction between the officer and the contractor, or other person, by whom the property is delivered; the former agreeing, for a consideration, to receive less than the amount to which the United States is entitled, (and thus relieve the latter from furnishing the entire quantity,) while at the same time giving him a receipt certifying on its face the delivery of the whole.[1]

Paragraph 9. The forms of offence here designated are—the Stealing, Embezzlement, Misappropriation, Misapplication, and improper Sale or Disposition of money or other public property, "furnished or intended for the military service."

Stealing. The offence of *larceny* has already been sufficiently fully considered under the Fifty-Eighth Article, by which general courts-martial are invested with a jurisdiction of this and sundry other crimes, *in time of war*. The present Article vests courts-martial with jurisdiction, *at all times*—in peace as well as in war—of larceny of *public property*, "furnished," &c., as above. For the stealing indeed of public money or military stores, a charge will *also* in general lie under Art. 62, inasmuch as such offence will ordinarily be one directly affecting military discipline.[2]

Embezzlement—*Definition.* This is not a common-law but a statutory offence.[3] In general terms it may be defined as a fraudulent or unlawful appropriation of money or other property, by a person in a fiduciary capacity,—as a servant, agent, trustee, bailee, &c.,—to whom, in such capacity, it has been en-

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which a disbursing officer who "accepts, receives, or transmits to the Treasury Department, to be allowed in his favor, any receipt or voucher from a creditor of the United States," without having in fact paid to him the full amount of its face, is declared to be guilty of the criminal conversion of such amount.

1. See case reported by Hough, 256, 266; also case in G. C. M. O. 11 of 1872, and DIGEST, 33.

2. See under the Sixty-Second Article, *post;* also DIGEST, 37.

3. 2 Bishop, C. L. § 319; *Ex parte* Hedley, 31 Cal. 111.

trusted by the owner.[1] Embezzlement, though really a specie of larceny,[2] differs from larceny at common law, and mainly i the fact that the latter involves, (as heretofore shown,[3]) a trespa by a taking from the possession of the owner, whereas in embe zlement, in general, the property being in the rightful possessic of the offender, no trespass can be committed by the appropri tion.[4]

Proof of the offence under the Article. To establis embezzlement in general it is necessary to show—1. That th accused was a servant or agent of the owner of the property, maintained some fiduciary relation toward him; 2. That he r ceived into his possession the money or other property of suc owner; 3. That he received it by virtue of his employment fiduciary relation; 4. That he fraudulently converted it to h own use.[5]

An officer or soldier of the army is always an agent or em ployee of the United States, and it will not in general be nece sary to prove his commission or enlistment unless it be speciall controverted. Where it is charged that the offence was com mitted by him in a particular function or capacity, as that o paymaster, quartermaster, commissary of subsistence, militar storekeeper, or other disbursing officer, or as quartermaster ser geant, commissary sergeant, hospital steward, &c.,[6] the fact tha such was his office or capacity and that he was duly actin therein at the time of the offence, will, if not admitted, read ily be established by general notoriety, by the party's admission

1. 1 Wharton, C. L. § 1009; 2 Bishop, C. L. § 325; Samuel, 515 *Ex parte* Hedley, 31 Cal. 108. "The property must be shown to have been entrusted to him, so that it was in his possession and not in the possession of the owner." Com. *v.* O'Malley, 97 Mass. 586.

2. See Com. *v.* Simpson, 9 Met. 143.

3. Under the Fifty-Eighth Article, *ante.*

4. Upon the history of Embezzlement, see 1 Wharton, C. L., c. XV; 2 Bishop, C. L., c. XVI; Com. *v.* Stearns, 2 Met. 345; Com. *v.* Simpson, 9 Id. 142; Com. *v.* Hayes, 14 Gray, 64; People *v.* Hennessey, 15 Wend. 151.

5. *Ex parte* Hedley, 31 Cal. 112.

6. Or as post treasurer of a military post, (G. C. M. O. 52 of 1877;) treasurer of a military prison, (Id.;) sergeant in charge of a recruiting rendezvous, (G. C. M. O. 37 of 1877.) And see case in G. C. M. O. 51 of 1883, of a soldier who embezzled a "depot fund."

of his status, or by the orders investing him with the particular character and duty.

The receipt and possession of the property will commonly be shown by the accounts, returns, &c., of the accused, by the testimony of the officer or other person by whom the money or other property was transferred, delivered, or paid, by the testimony of the public depositary, or by the open possession and use or disposition of the property *as* property of the United States.

The fact of the fraudulent conversion in embezzlement may be evidenced by the absconding[1] of the accused with public funds, or his desertion with articles of public property in his possession; by a deliberate falsification, as where the party denies that he has ever received the money or property which has been in fact committed or paid to him; by the rendering of a false return or account in which the receipt from the Treasury, (or from the proceeds of sales, &c.,) of the money alleged to have been embezzled, is omitted to be acknowledged, or in which a fictitious balance is made to appear, or which is otherwise falsified or purposely misstated;[2] by a failure altogether to render an account required by statute, regulation or order; by the unauthorized selling, giving, or otherwise disposing of public property to civilians or military persons;[3] by the paying out of public funds to persons not entitled to receive the same; by a neglect to pay sums justly due to employees, contractors, or other public creditors, out of money furnished for the purpose,[4] or to make any other required disbursement; by a neglect to honor proper requisitions for military stores, or a dealing of them out in short or insufficient quantities, notwithstanding that ample supplies have been provided by the gov-

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1. The element of *stealth* is said by the authorities to be peculiarly characteristic of this crime. Rex. *v.* Norman, C. & M. 501; Com. *v.* Tuckerman, 10 Gray, 201, 207; 1 Wharton, C. L. § 1030; Samuel, 515; O'Brien, 131.

2. As by charging amounts as paid which have not been paid. G. C. M. O. 49 of 1867; O'Brien, 131. One of the most significant falsifications of account consists in carrying balances over from one account to another as "money on hand," when in fact the same is not on hand but has been in some way illegally appropriated or expended.

3. The selling of ammunition, arms, clothing, &c., made punishable in Arts. 16 and 17, is a form of embezzlement; and so is the retention and conversion of captured property in violation of the injunction of Art. 9.

4. See Samuel, 529; O'Brien, 131.

ernment;[1] by a failure to turn over to a successor, on being lieved, the full amount of public property for which the offi is legally accountable;[2] or by any other form of non-performa or mal-performance of the trust devolved upon the party.[3] F ther, a conversion may be presumable from an inability on part of an officer to respond to the demand of an inspector g eral, or other proper authority, to make actual exhibit of account for the moneys, stores, &c., for which he is shown by returns or accounts to be responsible.[4] It may also be presu ble from an exhibit made of such moneys, effected by borrow money from other officers or persons, to represent, for the ı ment, an amount of public funds which should be in possess but has in fact been illegally used and is in deficit.

Defence. Presumptive evidence, such as has been indicat may be met by the proof of facts going to rebut the infere that the property has been fraudulently converted. Thus it n be shown that the funds or stores were captured by the ene lost without fault on the part of the officer, or stolen or p sumably stolen by a clerk, soldier or other person;[5] or tha deficiency of supplies was caused by wastage or an acciden over-issue.[6] So, in a case of an alleged conversion of prope other than money, the greater offence may be rebutted by e dence of a lesser; as, for example, by evidence that the prope was not embezzled but misapplied or improperly diverted o —as by using it for private purposes or loaning it.[7] But using of public *money* for private purposes, or the loaning of

1. Samuel, 527–8.

2. G. C. M. O. 19, 27, of 1872.

3. G. O. 18 of 1861. The mixing of one's private funds with public funds, by depositing them without authority with the same pu lic depositary, may, under some circumstances, be evidence of a fraud lent intent to convert the latter. Remarks of Secretary of War in C. M. O. 34 of 1872.

4. See G. C. M. O. 49 of 1867; also Do. 5 of 1869; Do. 81 of 1874.

5. See DIGEST, 35; also Secs. 1059, 1062, investing the Court of Clai with jurisdiction to determine the claims of disbursing officers for lief from pecuniary responsibility on account of the loss by them, wh in the line of duty, of public funds, &c., by "capture or otherwise and with authority to grant such relief where the officer was witho fault or negligence.

6. Hough, 257, 267.

7. See "Misapplication," *post.*

would, independently of the statutory provisions yet to be noticed, constitute an act of embezzlement, and it would be no justification that the accused fully intended to restore the amount,[1] or even that he did actually restore it before charges were preferred.[2]

A defence in the nature of offset or counter-claim could, it need hardly be added, scarcely be tenable in a military case. Thus an officer could not excuse the appropriation of public money in his hands on the ground that he was but reimbursing himself for pay or allowances wrongfully withheld from him.

Special Statutory Embezzlements. The statutes of the United States, *viz.* Secs. 5488, 5491 and 5492, Rev. Sts., have expressly declared that certain acts, when committed by disbursing officers, shall constitute embezzlements of public money and be punishable as such with fine and imprisonment. The acts specified are—the depositing, or withdrawing from deposit, of public moneys except as legally authorized; the failing to deposit the same in the Treasury or with a public depositary when required to do so by the proper superior; the loaning of the same with or without interest; the failing to render accounts for the same as provided by law; and the transferring or applying the same for any purpose not prescribed by law.[3] A further embezzlement, designated in Sec. 5496 as consisting in the acceptance, or transmittal to the Treasury for allowance, of vouchers or receipts for money which has not in fact been paid, has already been noticed under Paragraph 7.

These acts, though in terms made the subject of trial and punishment by the U. S. civil tribunals, are, when committed by *military* disbursing officers, properly taken cognizance of by courts-martial under Art. 60, as being forms of the statutory offence of embezzlement expressly constituted and defined in

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1. In Com. *v.* Tuckerman, 10 Gray, 201, 205, the Court say of an embezzlement that its criminality was not affected by the fact that, at the time of taking the funds, the party "intended to restore what he had so appropriated before the appropriation should become known to the owners, and believed that he should be able to do so, and had in his possession property to secure the full amount taken."

2. G. C. M. O. 34 of 1872. And see DIGEST, 35.

3. To these is added—the converting of such moneys in any manner to personal use. But this general offence is no more than the embezzlement already considered.

the laws of the United States. This was in effect ruled by Ge Holt as Secretary of War, in 1861, in the case of Capt. Jorda Asst. Quartermaster,[1] charged with the offence specified in Se 5496; and, in a series of instances since arising, officers of t army have been tried and sentenced by court-martial for speci embezzlements of the class under consideration.[2]

Rules of evidence on proof of these embezzlements—No specific intent required to be shown. These statuto embezzlements are consummated by the mere commission of t *act* in which the embezzlement in any instance is defined to co sist, without regard to the *purpose* or *motive* of the offender. It the object of the statute law to ensure, by every precaution su gested by experience, the safe-keeping and proper disposition the public moneys: it therefore makes the mere departure fro the rules which it has established with this view a crime *per* independently of the circumstances or the *animus* of the accuse these being left to affect only the measure of the punishme It is accordingly no defence that the act was unaccompani with a design to defraud the United States, or to convert t money to the party's personal use; or that it was done innocent and in good faith but under a mistake of judgment; or, whe moneys have been illegally withdrawn or used, that the amou was restored to the proper depositary or otherwise made go before formal demand was made for the same.[4]

2. Demand and refusal, prima facie evidence of gui The law,—in Sec. 5495, Rev. Sts.,—further expressly lays dow

1. G. O. 1, War Dept., 1861.

2. See cases in G. C. M. O. 175 of 1866; Do. 43, 86, of 1868; Do. 5 1869; Do. 2, 18, 21, of 1871; Do. 27, 34, of 1872; Do. 18, 58, 81, of 187 Do. 51 of 1875. In some cases an unauthorized withdrawing or depos ing of public moneys has been charged, in form or in substance. "Violation of Sec. 5488, Rev. Sts., to the prejudice of good order an military discipline." See G. C. M. O. 52 of 1877; Do. 5 of 1881; Do. of 1883.

3. In G. C. M. O. 34 of 1872, it is said by the Secretary of Wa specially of Sec. 5488, Rev. Sts., that it is "a statute enacted for th more complete protection of the Treasury, and which, without regar to the intent of the offender, denounces all withdrawals from a publ depositary, or dispositions of public moneys, not authorized by expre law." And see DIGEST, 34–35; XIV Opins. At. Gen., 473.

4. DIGEST, 35. And see G. C. M. O. 34 of 1872.

a *rule of evidence* to the effect that the refusal of any person, charged with the custody and disposition of public moneys, to pay any draft, order, or warrant drawn upon him, by the proper accounting officer of the Treasury, for the public money in his hands, or to transfer or disburse any such money promptly, upon the requirement of an authorized officer, "*shall be deemed, upon the trial of any indictment against such person for embezzlement, as presumptive evidence*" of the commission of the offence.[1] Applying this rule to a military case—proof of a formal demand upon an officer or soldier in charge of public funds, made by an authorized superior, to pay over or account for the same, followed by his refusal, or neglect within a reasonable time, so to do, would be evidence *per se* of embezzlement. Such evidence being produced, the prosecution would not be required to show what had become of the funds, but the burden would be thrown upon the accused to establish that his disposition of the same had been in accordance with law.[2]

Misappropriation. The knowing and wilful, (*i. e.* intentional,) misappropriation of public property, specified in Paragraph 9, may be defined to be the assuming to one's self, or assigning to another, of the ownership of such property, where the same is not entrusted to the party in a fiduciary capacity and the act is therefore not an embezzlement. Thus the offence is committed where an officer appropriates materials known by him to belong to the United States, or the labor of government employees, in erecting a building or constructing a carriage which is to be his own property.[3] The appropriation, however, need not be for the party's own benefit, but may be resorted to for a friend or for the accommodation of a person interested with the officer in some business, &c.

Misapplication. This offence is, strictly, distinguishable from the last in that it is properly an appropriation not of the *ownership* of the property but of its *use*, and that, by the terms of the paragraph, it must be an appropriation for the *personal*

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1. A further rule of evidence, in regard to the form of showing a balance of account against a person charged with embezzlem[illegible] public money, is enacted in Sec. 5495, Rev. Sts.

2. DIGEST, 35, 36.

3. See cases in DIGEST, 36; G. C. M. O

"benefit" of the offender; as where an officer or soldier ma use without authority of animals, vehicles, tools, &c., of the ernment—whether or not specially entrusted to his charge- the purposes of himself or his family.[1]

Wrongful Sale or Disposition. Under this designatio included sales, &c., such as are made punishable by Arts. 16 17, as also any other unauthorized sale,[2] or any unauthorized ple barter, exchange, loan, or gift, of public property.[3] The eral and comprehensive term '*wrongful disposition*' includes any appropriation or application of such property not embr within the previous descriptions of offences in this Paragr Thus it would include unauthorized applications of the posses or use of the property not for the private purposes of the offen as, for example, the loaning by an officer or soldier to a civil (for his benefit exclusively,) of stores, tools, materials, &c. the United States, with the understanding that the same we be returned.[4] This term, (wrongful disposition,) however, the designations of misappropriation and misapplication wl precede, is, in practice, not always employed in a strict sense, it would not be exceeding the privilege of military pleading charge as a "wrongful disposition," under this Article, any gal appropriation, diversion, or employment, knowingly m of money or other property of the United States, not clearly stituting a larceny or embezzlement.[5]

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1. See cases in DIGEST, 36; G. C. M. O. 379 of 1865.

It may be remarked that a clear distinction of meaning between terms "misappropriate" and "misapply," and between these and " bezzle," as also "wrongfully dispose of," is not strictly observe practice. In pleadings, drawn with no more than ordinary care, same act is not unfrequently found described by several or even al these terms in the same charge. Such irregularities, however, will nc general affect the validity of a sentence where an offence of this class been substantially proved and found.

2. As, for example, a sale of condemned public property made b quartermaster, in the absence of orders from the Department commar authorizing the same. G. C. M. O. 2 of 1878.

3. Such transactions are declared by Sec. 3748, Rev. Sts., to pas title, but to render the article sold, &c., subject to seizure on the par the United States, wherever found.

4. See cases in G. C. M. O. 26 of 1869; Do. 18 of 1874.

5. See note, *ante*, as to the absence, in general practice, of an accu discrimination in charging, &c., the offences of the class indicated in

Defence, &c. While an accidental, or slight and temporary, application to personal use, or an unimportant though irregular disposition, of government property will not in general be made the subject of a military charge, such application, &c., where material and continued, especially where so conspicuous as to constitute an example prejudicial to the *morale* or discipline of the command, may be a serious offence. And the fact that the same is practiced generally in a command, or is sanctioned by the commanding officer, cannot be accepted as a *defence* to the charge, though, as a circumstance to be considered in adjusting the measure of punishment, it may properly be admitted in evidence.[1]

Paragraph 10. This paragraph makes punishable the purchasing, or receiving in pledge, of arms, clothing, stores, or other public property, from an officer or soldier who is without authority to sell or pledge the same. It is thus in a measure the *complement* of the latter portion of the preceding paragraph, in which is designated the offence of selling or disposing of similar property. The act indicated is as a *military* offence most rare; as a civil offence, made punishable by Sec. 5438, Rev. Stats., it has been much more common.

Punishment. The Article provides that offenders, upon conviction, "*shall be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge.*" Such a court may therefore adjudge, in its discretion, either fine or imprisonment or both, and either with or without other penalties such as dismissal, discharge, reduction or forfeiture,[2] or any one or more of these penalties without either fine or imprisonment. Where imprisonment or fine is imposed, the court may properly consult, as indicating a reasonable measure of punishment, the provisions of Sec. 5438, Rev. Sts., prescribing penalties for *civil* offenders upon conviction of the same offences as those described in the Article, or—in cases of the specific statutory embezzlements—the provisions, as to punishment, of the Sections defining the

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Paragraph. Instances of embezzlement charged as "wrongful disposition" are occasionally to be met with in the G. O.

1. DIGEST, 36.

2. Embezzlement of military stores *in time of war* may be a most serious offence. By a Resolution of Aug. 22, 1780, (3 Jour. Cong. 511,) this offence was made punishable with *death.*

same. Where any considerable fine is adjudged, the court will do well to add an imprisonment until the fine be paid; this, with or without the limitation that the imprisonment shall not exceed a certain fixed number of years.[1] Where a dismissal is adjudged, the sentence, in a case of an offence involving *fraud*, should contain the direction in regard to the publication of the crime, punishment, &c., which is prescribed by Art. 100.[2]

Extent of Liability to Prosecution under the Article. The concluding provision of the Article, by which the jurisdiction of courts-martial over offenders is continued until after their separation, by discharge or dismissal, from the military service, has already been remarked upon[3] as being of at least doubtful constitutionality, in that it subjects *civilians* to military arrest, trial and punishment.[4] That such exceptional authority and jurisdiction, if accepted as legal, are still subject in their exercise to the general limitation of the 103d Article, has also been pointed out in a previous Chapter.[5]

XXVI. THE SIXTY-FIRST ARTICLE.

[CONDUCT UNBECOMING AN OFFICER AND A GENTLEMAN.]

"ART. 61. *Any officer who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.*"

The Original Article. The corresponding provision, as it appeared in the Articles of 1775, was as follows:—"*Whatsoever commissioned officer shall be convicted before a general court-martial of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and a gentleman, shall be discharged from the service.*" This language, which was taken

1. See *ante*, Chapter XX, p. 593.

2. *Ante*, Chapter XX, p. 574.

3. In Chapter VIII—"JURISDICTION OF GENERAL COURTS-MARTIAL."

4. For cases in which this jurisdiction was exercised, see G. C. M. O. 241 of 1864; Do. 45 of 1865; Do. 15 of 1871; G. O. 78, Dept. of the East, 1864; Do. 105, Dept. of the Mo., 1864; Do. 15, Dept. of the Carolinas, 1866; Do. 13, Dept. of the South, 1867; also G. O. 143, Navy Dept., 1869.

5. Chapter XVI, p. 361.

from the then existing British Articles, was repeated in the code of 1776, and re-enacted in substantially identical terms in the revision of 1786. In the succeeding code of 1806, the Article first assumed its present form, the words "scandalous" and "infamous" being omitted.[1]

Effect of the Present Form. It is the effect of this omission to extend materially the scope of the Article,[2] and thus indeed to establish a higher standard of character and conduct for officers of the army. As the Article now stands, it is no longer essential, to expose an officer to dismissal, that his conduct as charged should be *infamous* either in the legal or the colloquial sense;[3] nor is it absolutely necessary, (though this will often be its effect,) that it *scandalize* the military service or the community. It is only required that it should be "unbecoming"—a comprehensive term including not only all that is conveyed by the words "scandalous" and "infamous" but more.[4] At the same time the original phraseology is properly borne in mind as indicating that, to become the subject of a charge, the unbecoming conduct should be not slight but of a material and pronounced character.

Construction. In order to determine what is "conduct unbecoming an officer and a gentleman," it will be desirable first to define the two terms "unbecoming" and "gentleman."

"Unbecoming," as here employed, is understood to mean not merely inappropriate or unsuitable, as being opposed to good taste or propriety or not consonant with usage, but morally unbefitting and unworthy.

"Gentleman." So, *this* term is believed to be used, not simply to designate a person of education, refinement and good breed-

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1. That the conduct need no longer be *scandalous* or *infamous*, see G. O. 41 of 1852; DIGEST, 37. The term "scandalous conduct" is preserved in the article of the *naval* code, (Art. 8, first par.,) most nearly corresponding to our 61st. The present corresponding provision of the British law, (Army Act § 16,) is:—"Every officer who behaves in a scandalous manner, unbecoming the character of an officer and a gentleman, shall on conviction by court-martial be cashiered."

2. O'Brien, 160; G. O. 30 of 1852; Do. 29, Dept. of Cal., 1865; G. C. M. O. 69, Dept. of the East, 1870.

3. See Opin. At. Gen., in Gen. Swaim's case—G. C. M. O. 19 of 1885.

4. Tytler, 212; O'Brien, 160.

ing,[1] but to indicate such a gentleman as an officer of the army expected to be,[2] *viz.* a man of honor; that is to say, a man o high sense of justice, of an elevated standard of morals a manners, and of a corresponding general deportment.

The Misconduct contemplated. These terms being tled, it is next to be observed that the conduct had in v by the Article may not consist in conduct unbecoming an *off* only, or in conduct unbecoming a *gentleman* only, but must every case be unbecoming the accused in *both* these charac at once. Acts which are not creditable to an officer will of indeed alike involve the reputation of the individual as a gen man, but there are many such acts, as for example certain n lects of strictly military duty or instances of disregard of milit orders or obligations, to which this effect could not properly ascribed.[3] On the other hand, there may be things done b party in connection with his purely private and personal r tions, which while they may, temporarily at least, comprom his character as a gentleman, will not necessarily seriously af his standing as an officer or directly discredit the service.[4]

To constitute therefore the conduct here denounced, the which forms the basis of the charge must have a double s nificance and effect. It must offend so seriously against la justice, morality or decorum as to expose to disgrace, socially as a man, the offender, and at the same time must be of suc nature or committed under such circumstances as to bring d honor or disrepute upon the military profession which he rep sents.[5]

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1. Imperial Dictionary; Webster's Do.

2. "An officer of the army * * * is bound by the law to be a g tleman." Cushing, VI Opins. At. Gen., 417. It is said by De Ha (p. 372.) that—"the military community cannot expect, nor ought it be expected of them, to preserve a higher tone of moral conduct th what is sustained by the higher orders of society." But they may fai be expected to preserve one which is in no degree lower." See G. 41 of 1852, p. 5.

3. See G. O. 29, Dept. of Cal., 1865; also Do. 3, War Dept., 18 where a neglect of duty, charged under this Article, is referred to as r being "of the immoral and dishonorable or disreputable character ne essary to sustain a charge under" the same.

4. See G. O. 30 of 1852.

5. See De Hart, 371, 374, 376; DIGEST, 38. It is not absolutely e sential that the act of the offender should be intrinsically dishonorab

It is to be observed that while the act charged will more usually have been committed in a military capacity, or have grown out of some military status or relation, it is by no means essential that this should have been its history.[1] It may equally well have originated in some private transaction of the party, (as a member of civil society or as a man of business,) which, while impeaching his personal honor, has involved such notoriety or publicity, or led to such just complaint to superior military authority,[2] as to have seriously compromised his character and position as an officer of the army and brought scandal or reproach upon the service. Of this description is that disregard of his pecuniary obligations by an officer which—as will presently be noted—may, under certain circumstances, properly become the subject of a charge under the present Article.[3] But a charge founded upon a purely private transaction of an officer of the army is not favored in military law, and unless clearly of the above character should not be entertained.[4]

It may be added that if the act, though ungentlemanlike, be of a trifling character, involving no material prejudice to individual rights, or offence against public morals or decorum, it will not, (as already remarked,) in general properly be viewed as so affecting the reputation of the officer or the credit of the service as to be made the occasion of a prosecution under the Article.[5]

The quality, indeed, of the conduct intended to be stigmatized by this provision of the code is, in general terms, indicated by

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Thus in G. O. 25, Dept. of the Mo., 1867, Gen. Hancock observes:—"It is not considered that the conduct of an officer should necessarily affect his honor to make him subject to a charge laid under this Article. An officer may be guilty, in the heat of passion, of conduct properly so laid, without affecting his honor. * * * Although dishonorable conduct is conduct unbecoming an officer and a gentleman, the converse of the proposition is not always true." And see G. O. 3 of 1856, cited in note *ante*, where the conduct is described as "dishonorable *or* disreputable." Cases, however, in which conduct properly charged under this Article does not involve some dishonor, are rare.

1. De Hart, 373; O'Brien, 159–60; U. S. *v.* Runkle, 19 Ct. Cl. 414, citing DIGEST, 39.

2. DIGEST, 40. As to complaints made to the War Department, see *post*.

3. DIGEST, 39, 40.

4. See Manual, 304.

5. See O'Brien, 159; G. O. 97, 111, Army of the Potomac, 1862: DIGEST, 38.

the fact that a conviction of the same must necessarily entail th penalty of *dismissal.* The Article in the fewest words declar that a member of the army who misconducts himself as describ is unworthy to abide in the military service of the United State The fitness therefore of the accused to hold a commission in t army, as discovered by the nature of the behaviour complain of, or rather his worthiness, morally, to remain in it after and i view of such behaviour, is perhaps the most reliable test of h amenability to trial and punishment under this Article.

General Definition. "Conduct unbecoming an officer a a gentleman" may thus be defined to be:—Action or behavio in an official capacity, which, in dishonoring or otherwise di gracing the individual as an officer, seriously compromises h character and standing as a gentleman; *Or* action or behaviour i an unofficial or private capacity, which, in dishonoring or di gracing the individual personally as a gentleman, seriously com promises his position as an officer and exhibits him as morally u worthy to remain a member of the honorable profession of arms.

Instances of Offences charged under the Article. Th definition above given is best illustrated by a reference to th principal offences which, in practice, as indicated mainly by th

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1. "The retention of a member of the army, after a conviction of th derogatory nature, would not only be disreputable to the character of th military society, but of no indirect tendency, from the force of exampl to contaminate the body of the society itself." Samuel, 645. Simmon (§ 158,) refers to the Article as "essential to the high respectability an honorable character of the army, by providing for the removal from of officers who may be guilty" of the conduct denounced. And se O'Brien, 159. In G. O. 111, Army of the Potomac, 1862, it is said b Gen. McClellan : — "These words, ('conduct unbecoming,' &c.,) im ply something more than indecorum, and military men do not conside the charge sustained unless the evidence shows the accused to be on with whom his brother officers cannot associate without loss of self re spect." In G. C. M. O. 88, War Dept., 1874, it is observed, that—"th chief end and aim of this Article is to maintain a correct rule of gentle manlike conduct among officers of the army, and, with this view, to pro vide for expulsion from the service of any who may be guilty of suc disgraceful or scandalous offences against decency as those set forth i these specifications," (gross drunken conduct, and association with pros titutes, in public.) And see G. O. 167, Dept. of Va. and No. Ca., 1864 Do. 29, Dept. of Cal., 1865; also opinion of At. Gen. in Gen. Swaim' Case, G. C. M. O. 19 of 1885.

General Orders, have been charged and prosecuted under this Article.[1] These are as follows:—

Making false official statements, reports, &c., to superior officers.[2]

Making false official statements to an inferior officer,[3] or false representations in turning over to such an officer public property.[4]

Using insulting and defamatory language, without justification to another officer, or of him in the presence of other military persons, or behaving towards him in an otherwise grossly insulting manner.[5]

Writing or publishing false or libellous matter in regard to another officer.[6]

Knowingly preferring false charges or accusations.[7] Attempting by underhand means to undermine the reputation of an officer.[8]

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1. It is in construing this Article that Hough, (P., 222,) well observes:—"The decisions of courts-martial, when confirmed, show more clearly than any legal work can do what is the opinion of military men, who sit to try such cases, (*i. e.* cases of offences charged under this Article,) in a great measure as *a court of honor.*"

2. G. O. 22 of 1845; Do. 36, 42, of 1851; Do. 30 of 1852; Do. 6 of 1856; Do. 234 of 1863; G. C. M. O. 279 of 1864; Do. 166, 179, of 1866; Do. 7, 38, of 1867; Do. 41, 60, 71, 74, of 1868; Do. 1, 5, 19, 20, 61, 62, 67, 71, of 1869; Do. 24, 38, 47, 49, of 1870; Do. 2, 20, of 1871; Do. 12, 13, 19, 35, of 1872; Do. 10, 27, 52, of 1873; Do. 3, 23, 68, of 1874; Do. 67, 84, 92, 104, of 1875; Do. 108 of 1876; Do. 18, 36, 46, 52, of 1877; Do. 38 of 1880; Do. 5, 11, of 1881; Do. 39 of 1882; Do. 30 of 1883; G. O. 35, Dept. of the Miss., 1862.

3. G. C. M. O. 251 of 1864; Do. 61, 73, of 1869; Do. 4 of 1873; Do. 39 of 1877.

4. G. C. M. O. 24 of 1868; Do. 5, 62, of 1869; Do. 52 of 1873.

5. G. O. 41, 97, of 1835; Do. 30 of 1852; Do. 15 of 1860; Do. 146, 168, 183, 243, 249, 310, 330, 380, of 1863; Do. 13, 33, 49, 69, 81, of 1864; G. C. M. O. 100, 149, of 1864; Do. 425 of 1865; Do. 1 of 1870; Do. 20 of 1871; Do. 4 of 1872; Do. 9, 27, of 1873; Do. 11 of 1874; Do. 127 of 1876; Do. 41 of 1879; G. O. 73, Army of the Potomac, 1862; Do. 16, Mountain Dept., 1862.

6. G. C. M. O. 80 of 1875; Do. 44 of 1878; Do. 1 of 1881; G. O. 86, Dist. W. Tenn., 1862; Do. 28, Dept. of the Mo., 1861.

7. G. O. 9 of 1853; Do. 1, 6, of 1856; G. C. M. O. 638 of 1865; Do. 44 of 1878; Do. 1 of 1881.

8. G. O. 26 of 1835. And see Hough, 526; Id., (P.) 233. In a case, however, in G. O. 18 of 1861, in which an officer was convicted of keeping a "*black book*," in which to record the derelictions of his brother officers, with a view to charges, &c., as an offence under this Article,

Opening and reading letters or communications addresse another officer.[1]

Making a violent assault without due cause upon anothe cer.[2]

Giving false testimony as a witness before a court-marti board.[3] Attempting to suborn testimony to be given bef court-martial.[4]

Breach of trust, official, semi-official, or personal.[5]

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the finding was disapproved on the ground that public authority have no right to inquire into private records of this nature.

1. G. O. 15, Dept. & Army of the Tenn., 1864; G. C. M. O. 1 1866. In Col. D'Utassy's case, (G. O. 159 of 1863,) this offenc charged under Art. 62.

2. G. O. 30 of 1852; Do. 249 of 1863; Do. 13, 47, 69, of 186 C. M. O. 197 of 1864; Do. 177 of 1866; Do. 28, 68, of 1869; D of 1870; Do. 29 of 1871; Do. 58 of 1873.

3. G. O. 37, Dept. of Kansas, 1864; G. C. M. O. 13 of 1872; of 1873; James, 601. And see case in Do. 173 of 1876, of a conv for the using of a false affidavit by an accused in connection wi address to the court.

4. G. O. 69 of 1864.

5. *In an official capacity:* G. C. M. O. 31, 82, of 1868; Do. 1869; Do. 26 of 1871; Do. 36 of 1877—(cases of appropriating pany savings;) G. O. 22 of 1845; G. C. M. O. 73 of 1869—(ca appropriating the company fund;) G. C. M. O. 15 of 1870—(case propriating savings of flour ration of enlisted men and post hospit a post treasurer;) G. C. M. O. 26 of 1871; Do. 52 of 1877—(ca appropriating the post fund by a post treasurer;) G. C. M. O. 1877—(case of appropriating a prison fund;) G. C. M. O. 28 of Do. 26 of 1871; Do. 51 of 1875—(cases of appropriating extra pay;) G. C. M. O. 26 of 1871; Do. 12 of 1872—(appropriation of m due contractors and citizens;) G. C. M. O. 18 of 1874—(appropr by an A. Q. M. of a check on a U. S. depositary;) G. C. M. O. 1869; Do. 25 of 1871—(appropriation by an A. C. S. and a mi storekeeper of the proceeds of sales of public property;) G. (Dept. of No. Ca., 1865—(appropriation of captured cotton by the commanding the guard;) G. C. M. O. 376, 380, of 1864; Do. 38 of —(appropriation of bounty money by recruiting officers;) G. O Dept. of the Gulf, 1865—(appropriation of soldiers' pay by their ca who had received it for them from the paymaster;) G. O. 234 of 1 (appropriation of money of deceased soldiers required to be sent to heirs;) G. O. 59 of 1864—(appropriation of property in the char the officer as provost marshal;) G. C. M. O. 13 of 1879—(appropri of medicines and hospital stores by the surgeon in charge.)

In a semi-official or personal capacity: G. O. 204 of 1863; G. (O. 28 of 1870; G. O. 39, Dept. of Va., 1863; Do. 33, Dept. of No 1865—(appropriation of money received from soldiers for safe-kee transmission, &c.;) G. C. M. O. 50 of 1874—(appropriation of m

Dishonorable neglect to discharge pecuniary obligations.[1]

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belonging to an officers' private mess;) G. C. M. O. 21 of 1869; Do. 50 of 1874—(appropriation of money committed to the officer by civilians;) G. C. M. O. 50 of 1884—(using for himself and family the provisions and property of his troop.) In a leading case of this class, in G. C. M. O. 24, Dept. of the East, 1878, of an officer charged, under Art. 61, with failing to account for a fund which had been raised for the erection of a soldiers' monument, and entrusted to his charge, the finding was Guilty only of conduct to the prejudice of good order, &c.

1. G. C. M. O. 87 of 1866; Do. 46 of 1872; Do. 10 of 1873; Do. 25, 50, 68, of 1874; G. O. 55, Dept. of Washington, 1863; Do. 110, Id., 1864; Do. 1, Dept. of Va. & No. Ca., 1864—(cases of non-payment of sums borrowed from, or otherwise due to, enlisted men;) G. C. M. O. 58 of 1874—(case of non-payment of a loan from another officer;) G. C. M. O. 17 of 1871; Do. 68 of 1874; Do. 25 of 1875; Do. 100 of 1876—non-payments of debts due to post-traders;) also G. C. M. O. 3, 55, 64, of 1869; Do. 15 of 1870; Do. 22 of 1872; Do. 82 of 1874; Do. 100 of 1876; Do. 46 of 1877; Do. 44, 70, of 1881; G. O. 150, Navy Dept., 1870; G. C. M. O. 36, Id., 1881. And see English precedents of convictions under a corresponding Article for dishonorable disregard of indebtedness to military persons or civilians, in James, pp. 205, 223, 303, 510, 528, 614, 622, 696; also Hough, (P.) 234–5.

In these cases, in general, the debt was contracted under false representations, or the failure to pay characterized by deceit, evasion, false promises, denial of indebtedness, &c., and the neglect to discharge the obligation, at least in part, was continued for an unconscionable period. Some such culpable and *dishonorable* circumstances should characterize the transaction to make it a proper basis for a military charge. A mere failure to settle a private debt, (which may be more the result of misfortune than of fault,) cannot of course properly become the subject of trial and punishment at military law. (See G. C. M. O. 69, Dept. of the East, 1881.) A test of the amenability of the party to charges will be the effect of his conduct upon the reputation of the service. If it be such as to compromise not only the officer personally but also the honor or credit of the military profession,—if, in the words of Gen. McDowell, in G. C. M. O. 113, Dept. of the East, 1870, it "brings the service into disrepute by lowering the faith of the country in the integrity and fidelity to their obligations, of the commissioned officers of the Army,"—an offence within the present Article will in general properly be held to have been committed. And see further on this subject, G. C. M. O. 49, Dept. of the East, 1872; DIGEST, 39–40. In G. C. M. O. 70 of 1881, a conviction of the offence under consideration was disapproved on the ground that there was no *fraud* in the officer's conduct.

In February, 1872, the following was published as a Circular to the Army, by the order of the Secretary of War: "The War Department is frequently annoyed by requests of creditors to compel payment of their just dues by officers of the army. There may be a few instances where delay in making payment is unavoidable. But in a large number of cases an evident disposition appears to evade payment altogether. It is not the province of the Secretary of War to adjudge such claims, nor is it within his power to stop the debtor's pay, and thus compel him to

Duplication of pay accounts.[1]

Cruel punishment, or cruel, or unduly violent, treatment of soldiers.[2]

Demeaning of himself by an officer with soldiers or military inferiors.[3]

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satisfy the claim. But such complaints, coming so frequently from creditors, civil and military, betray a fact greatly to be deplored, that the high standard of honor in such matters, which in former years caused the uniform to be respected and trusted without question, has become impaired. While, therefore, those concerned should relieve the Department from the mortification of such appeals, and the army from the odium which must attach to the necessity for making them, the Secretary now distinctly declares his intention to bring to trial by court-martial, under the 61st Article of War, any officer, who, after due notice, shall fail to quiet such claims against him; and there are not wanting on record instances where commissions have been lost for this offence."

1. This offence has already been referred to as not unfrequently charged under Art. 60, when involving the presenting, &c., of a fraudulent claim for pay against the United States. It is peculiarly properly charged under Art. 61 where individuals are swindled by the fraud of the officers. For cases of convictions see the following Orders:—G. C. M. O. 56, 64, of 1867; Do. 61, 64, 72, of 1869; Do. 11, 22, 23, 38, 43, of 1870; Do. 28, 31, of 1872; Do. 42, 57, of 1874; Do. 25, 50, 59, 104, of 1875; Do. 17, 37, 100, of 1876; Do. 46, 52, of 1877; Do. 40 of 1878; Do. 32, 48, 62, of 1883; Do. 8, 9, of 1884; Do. 20, 23, of 1885; Do. 37, Navy Dept., 1883. In 25 of 1875, the accused is also convicted of selling his pay rolls to bona-fide purchasers after his pay had been, to his knowledge, stopped by the Pay Department. In 46 of 1877, the accused is also convicted of having twice sold and received value for his mileage vouchers.

2. G. C. M. O. 74 of 1868; Do. 13 of 1873; Do. 23 of 1874; Do. 114 of 1875; Do. 36 of 1880; Do. 61 of 1881; G. O. 34, Army of the Potomac, 162. And see Hough, 536. In 13 of 1873, where the only excuse for the ill-treatment by the officer of the soldier was that he was an incorrigible drunkard, the reviewing authority remarks:—"This apology is wholly unavailing for the arbitrary and cruel punishment inflicted upon this unfortunate man. Indeed his condition of helpless drunkenness at the time of the violent assault upon him by accused must be regarded rather as an aggravation of the latter's offence." In a case in G. O. 20 of 1826, an officer is convicted under this Article for striking with his fists and a cowhide a female camp-follower; in G. C. M. O. 48, Dept. of the Mo., 1884, for assaulting and beating a mess-servant.

3. As by drinking and carousing, or other drunken conduct, with them;—see cases in G. O. 199, 209, of 1863; Do. 72 of 1864; G. C. M. O. 472 of 1865; Do. 37, 53, 60, of 1869; Do. 114 of 1875; Do. 34, 39, of 1877; G. O. 4, Army of the Potomac, 1863; James, 369: By gambling with them;—see G. O. of Dec. 10, 1812, (pitching dollars for money;) Do. 1 of 1847; Do. 234 of 1863; G. C. M. O. 93 of 1875; G. O. 39, Army of the Potomac.

Abuse of authority over soldiers by frauds or exactions pracised upon them, or by requiring or influencing them to do illegal cts.[1]

Acts of fraud or gross falsity, cheats, or other corrupt conduct ot included under former heads.[2]

861; Do. 26, Id., 1862; Do. 34, Id., 1862, (while officer of the guard, ith soldiers of the guard;) Do. 47, Dept. of Washington, 1863; Do. 112, Dept. of the Mo., 1863; Do. 15, Dept. & Army of the Tenn., 1864, (while fficer of the day;) Do. 25, Dept. of the South, 1862; Do. 16, Mountain Dept., 1862; Do. 22, Dept. of the Gulf, 1863; Do. 149, Id., 1864; Do. 29, Dept. of No. Ca., 1865; Do. 14, Dept. of Ky., 1865: By indecently or nbecomingly familiar association or dealing with them, or indecent conluct in their presence;—see G. O. 10 of 1825; G. C. M. O. 665 of 1865; Do. 43, 61, of 1867; Do. 84 of 1875; Do. 173 of 1876; G. O. 49, Dept. of Washington, 1863.

In some early cases reported by James, (see pp. 206, 234,) officers ere convicted of unbecoming conduct in associating on familiar terms ith persons of inferior social rank,—as, (in a case of a lieutenant and n ensign,) with "a journeyman baker and a tinman's apprentice."

In this connection may be noted a class of cases, belonging mostly to he past, of officers charged with a violation of this Article in pusillaniously submitting to public insult or chastisement by inferiors or others, ithout taking any measures to vindicate themselves. See instances in ames, 345, 654, 759, 762, 769; also *In re* Poe, 5 B. & Ad., 681. Simiir cases in our service are found chiefly in G. O. between 1809 and 1812; f which the cases in G. O. of Jany. 2, 1810, Jany. 10, 1811, and March 18, 811, were convictions. In a more recent case of this nature, published 1 G. O. 25, Dept. of Cal., 1871, the accused was acquitted.

1. As by defrauding soldiers of portions of their bounty money by false epresentations and pretences—G. C. M. O. 232, 519, of 1865: By paying a debt to a soldier by palming off property upon him of much less alue, by means of false representations as to its worth—G. O. 234 of 863: By exacting from soldiers excessive usurious interest, (25 *per ent*,) on loans made to them—G. O. of Dec. 24, 1811: By exacting om soldiers double the amount, at the next pay day, for sums of money reviously loaned—G. O. 4, Dept. of the Gulf, 1866; DIGEST, 40: By rdering a sergeant to report him (the accused) present when absent—. O. 94 of 1863: By directing a soldier to make a false statement to nother officer in regard to action of the accused—G. C. M. O. 5 of 872: By employing soldiers to perform work for his private benefit—. O. 72 of 1836: By causing soldiers to furnish their labor to a civilian 1 payment of a debt due the latter by the accused—G. O. 71 of 1822: y inducing soldiers illegally to seize private property for his personal se, in time of war—G. O. 249 of 1863: By conspiring with soldiers to ffect sales of public property to civilians, for personal gain and to the aud of the United States—G. C. M. O. 58 of 1868: By causing a nonommissioned officer to make a false guard report, in order to relieve im (the officer) from an imputation of neglect of duty. G. C. M. O. 3 of 1880.

2. As drawing forage for two private horses when not entitled to

Drunkenness of a gross character committed in the presen

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draw for any—G. O. 22, Dept. of the Northwest, 1865: Drawing rati for his wife and daughters as laundresses—G. O. 183 of 1863: Fals entering on muster-rolls the names of men as enlisted by him, and ca ing them to be personated by other persons at the muster-in—G. 184 of 1863: As A. C. S., fraudulently overcharging officers and sold for commissary stores with intent to misappropriate the accru profits—G. C. M. O. 2 of 1871: As Same, using false scales in issu stores—G. O. 2, Dept. of the Pacific, 1864: As Same, giving to a comp commander, for the amount of the company savings, a check on a b where he had no funds—G. C. M. O. 61 of 1869: Obtaining money fi civilians, and board at a hotel, by giving such checks—G. C. M. O. of 1875; Do. 43 of 1870; G. O. 16, Div. of Pacific, 1866; Obtaining s of money from citizens by transferring to them forged paymasters' che on the Ast. Treasurer—G. O. 18, Dept. of the East, 1865: Obtair money from a banker by falsely representing that it was for the us the regiment—Hough, 540: Falsely denying his signature to a prom sory note payable to a citizen—James, 360; Refusing to approve a zen's vouchers for reward for arrest of deserters on the false ground they could not be paid for some time, and thereupon buying them for much less than their face and collecting and appropriating the amounts—G. C. M. O. 71 of 1867: Extorting money from citizens— O. 16, Mountain Dept., 1862: Selling to an officer a public horse falsely representing it to be private property—G. C. M. O. 493 of 18 Do. 100 of 1867: Attempting to sell to another officer a public hors G. C. M. O. 6 of 1865; Do. 46 of 1870: Attempting to pass the gua with a forged pass and by an assumed name—G. O. 5, Army of Potomac, 1863: Giving a false name to an officer of the provost gua on being arrested—G. O. 3, Army of the Potomac, 1862: Fals availing himself of a leave of absence intended for another officer— O. 234 of 1863: Altering, so as to extend, a leave of absence—G. O. Dept. of the Cumberland, 1869: Denying that he was an officer of army, when absent from his regiment on an expired leave—G. O. of 1863. By false representations retaining possession of certain perso effects of another officer, and pledging the same as security for the p ment of a bill for board—G. C. M. O. 20 of 1868: Cheating at cards w other officers—G. O. 11 of 1849; Do. 6 of 1856: (And see case in Jan p. 744, of a violation of this Article in conspiring to involve a yo lord in deep play, and winning from him upwards of £1500:) Cheat a soldier of three dollars at cards—G. O. 25, Dept. of the South, 18 "Displaying a want of veracity"—James, 397: Becoming, as quar master, corruptly interested in public contracts, and receiving la sums as part of the proceeds—G. C. M. O. 57 of 1870: Paying a c tractor the face of a false voucher for an amount greater than was d and receiving back from him the balance—G. C. M. O. 31 of 18 Taking money from substitute agents for approving their appointmen G. C. M. O. 303 of 1865: Taking bribes from, and aiding and acting complicity with, substitute brokers—G. C. M. O. 565 of 1865: Furni ing substitutes for drafted men for a compensation—G. O. 17, De of the East, 1864: Do. 10, Dept. of the Susquehanna, 1864: Tak bribes to allow civilians to pass the picket line—G. O. 48, Dept. of

of military inferiors, or characterized by some peculiarly shameful conduct or disgraceful exhibition of himself by the accused.[1]

Drunkenness, or indulgence in intoxicating liquor, after a formal *pledge* given to a commanding officer to abstain from such indulgence.[2]

Engaging in unseemly altercations or broils with military per-

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Gulf, 1863: The same, to allow them to pass goods within the lines—G. O. 9, Dept. of Va., 1863: Receiving money in consideration for the appointment of a person as lieutenant in the regiment in which the accused was colonel—G. O. 33, Dept. of No. Ca., 1865: Offering money and promotion to two inferior officers in consideration of their not pressing charges against the accused—*Id.*: Making a corrupt proposition to a quartermaster to induce him to permit the accused to keep and use a public horse as his private property—G. C. M. O. 54 of 1873: Secretly proposing to a civilian to join in a transaction for making a profit upon arms to be furnished by the U. S. to the States—G. O. 5 of 1856: Paying money in consideration of services rendered in procuring the appointment of his son to the Naval Academy—G. O. 156, Navy Dept., 1870: Corruptly soliciting and receiving money for procuring a contract for transportation of troops to be awarded to a certain steamship company—G. C. M. O. 9 of 1879.

1. See cases of convictions in the following Orders:—G. O. 72 of 1836; Do. 6 of 1840; Do. 1 of 1847; Do. 35, 52, 156, 187, 199, 261, 380, of 1863; Do. 36, 64, 72, of 1864; G. C. M. O. 100, 109, 114, of 1864; Do. 240, 472, 599, of 1865; Do. 15 of 1866; Do. 3, 5, 35, 43, 58, 59, of 1867; Do. 22, 45, 49, 62, of 1868; Do. 4, 23, 27, 37, 48, 53, 60, of 1869; Do. 5, 10, 15, 28, 53, of 1870; Do. 13 of 1871; Do. 4, 30, of 1872; Do. 21, 43, of 1873; Do. 41, 82, 88, of 1874; Do. 9, 33, 34, 58, 84, of 1875; Do. 39, 46, 55, 57, 58, 61, 75, of 1877; Do. 12, 39, 53, of 1878; Do. 59 of 1879; Do. 42, 50, of 1880; Do. 32, 59, 63, of 1881; Do. 49 of 1883; G. O. 4, Army of the Potomac, 1861; Do. 17, 81, Id., 1862; Do. 4, Id., 1863; Do. 52, Dept. of Washington, 1863; Do. 97, Id., 1864; Do. 175, Dept. of the Ohio, 1863; Do. 57, Dept. of Va. & No. Ca., 1863; Do. 54, Id., 1864. And see Hough, 634; James, 106, 119, 250; DIGEST, 39.

That a mere act of drunkenness, unaccompanied by any unseemly behaviour, violence, or disorder, would not, in general, properly be charged under this Article, is pointed out in G. O. 97 & 111, Army of the Potomac, 1862. Of the cases above cited, nearly all were of a gross character; most of the offences being committed in places of public resort, as on the street, in hotels, "saloons," theatres, &c., or in the presence of military persons at the officer's post or station, and under circumstances of aggravation.

2. The "pledge" is properly in writing and is generally expressed to be "on honor." It commonly recites that it is given in consideration of having charges for previous acts of drunkenness withdrawn or suspended, or of being released from an arrest, imposed with a view to trial upon such charges. See instances of these pledges and of convictions of this offence in the following Orders:—G. C. M. O. 3 of 1867; Do. 9, 49, of 1868; Do. 23 of 1869; Do. 13, 28, of 1871; Do. 53 of 1873; Do. 73 of 1874; Do. 6, 21, 55, 58, 67, 103, of 1875; Do. 5, 24, 164, of 1876; Do. 30, 47, of 1878; Do. 36, 44, 74, of 1877; Do. 42, 62,

sons or civilians, breaches of the peace, or other disorderly violent conduct of a disreputable character in public.[1]

Defiance of, or gross disrespect toward, the civil authorities.[2]

Doing wanton injury to the property of civilians.[3]

Open ill treatment of his wife.[4] Attempt to obtain a divo through fraud, &c.[5]

Offending against good morals, in violation of the local law of public decency and propriety.[6]

Commission of felony or crime.[7]

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of 1880; Do. 3 of 1881; Do. 49 of 1883; Do. 31, Navy Dept., 1882; 18, Id., 1885; G. O. 161, Dept. of Washington, 1865. And see cas conviction, in G. C. M. O. 63 of 1876, where the pledge violated "on honor as an officer and a gentleman" not to enter a gambling loon or gamble, and was given on obtaining from the commander a pension of action upon a pending charge preferred for a violation previous similar pledge.

1. See cases in G. O. 20 of 1859; G. C. M. O. 599 of 1865; Do. of 1866; Do. 5 of 1867; Do. 22 of 1868; Do. 4, 23, of 1869; Do. 1870; Do. 30 of 1872; Do. 58, 84, of 1875; Do. 64 of 1877; G. O. Dept. of the Mo., 1862; Do. 57, Dept. of Va. & No. Ca., 1863; 54, Id., 1864; Do. 11, Dept. of Miss., 1866; Hough, 505, 542; Jar 305, 574, 689,

2. See case of grossly disrespectful and insulting conduct toward a ju of the U. S. Dist. Court, in G. O. 22 of 1845: Also case of aggrav interference with, and resistance of, police officers engaged in the pr discharge of their duty, in G. C. M. O. 103 of 1866.

3. See case in G. O. 111, Dept. of Washington, 1864.

4. See cases of assaulting and abusing of his wife by an officer military post, in G. C. M. O. 17 of 1871; Do. 63 of 1881; G. O. 1, D of Miss., 1866; DIGEST, 41.

5. DIGEST, 41.

6. As by abandonment of legal wife and committing of bigamy—C M. O. 14 of 1879; DIGEST, 41: Introducing in camp, or at post, &c., passing off as his wife, a woman who was not such—G. C. M. O. 26 1864; James, 696: Insulting language or behaviour to, or indecent as upon, a respectable woman—G. C. M. O. 249 of 1863; Do. 35 of 1 Do. 21 of 1869; Do. 13 of 1871; Do. 12 of 1874; Do. 33 of 1875; G 52, Dept. of Washington, 1863; Do. 52, Middle Dept., 1863. And G. C. M. O. 15 of 1871: Public association or gross conduct with n rious prostitutes—G. O. 187, 380, of 1863; G. C. M. O. 74, 92, of 1 Do. 33, 46, of 1870: Do. 88 of 1874; Do. 46 of 1877; Do. 61 of 1880 O. 17, Army of the Potomac, 1862; Do. 14, Dept. of the Ohio, 1 Do. 19, Dept. of the Gulf, 1863: Frequenting houses of ill fame in form—G. O. 74 of 1864; G. C. M. O. 88 of 1874; Do. 13 of 1879 O. 11, Dept. of Miss., 1866: Visiting gambling houses and gamblin uniform—G. C. M. O. 34 of 1880: Unauthorized intrusion at night u the privacy of an officer's family—G. C. M. O. 20 of 1880.

7. That an officer was properly chargeable under this Article i

Scope of the Article as distinguished from Art. 62. It is to be remarked that while Art. 62 is intended to cover only offences not cognizable under the other Articles, Art. 61 embraces offences made punishable by *any other Article*, provided such offences be characterized in their commission by circumstances so dishonorable or disgraceful as to bring them within the definition of "conduct unbecoming an officer and a gentleman." Thus while the conduct involved in some of the more strictly military offences, such as desertion or mutiny, could scarcely properly become chargeable under this Article, there are many other offences punishable in the code, such as the making of false musters, certificates or returns, together with embezzlement and other offences set forth in Art. 60, which, under certain circumstances, would very properly be presented under both Articles—Art. 61 and the specific Article in which the act is described or named. But unless such act clearly and directly compromises the individual as a *gentleman* as well as in his military capacity, the charge of "conduct unbecoming," &c., should be omitted.

Procedure—*Charge.* The offence not being described in the Article except merely by its technical name, the general rule that the constituents of the offence should be fully averred in the specification, applies with peculiar force to this charge.[1] An act which perhaps would not fall within the description of this Article, if concealed or private, may become properly chargeable thereunder if committed in the presence of enlisted men or other military inferiors, or in a public place, or even in uniform. Where so characterized the fact should be specifically stated. So, the purpose or motive of the accused in the conduct complained of should be set forth wherever it is his *animus* which has rendered his alleged acts unbecoming, &c.

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felonious homicide, or other crime punishable by the laws of the land, was held by the Attorney General in Steiner's case, in VI Opins., 415; and in a case in G. C. M. O. 28 of 1873, a murder of a civilian by an officer was charged as a military offence under Art. 61, and the conviction of the accused and his sentence of dismissal were approved by the President. Similarly officers have been charged and tried under this Article for stealing from other officers, (G. O. 4 of 1864; G. C. M. O. 149 of 1864; Do. 23, 164, of 1865;) stealing from citizens, (G. O. 249 of 1863;) receiving from soldiers, and keeping property known to be stolen, (G. O. 204 of 1863; Do. 36 of 1864;) robbery, (G. O. 6, Dept. of Ky., 1865.)

1. Samuel, 646; Tytler, 212; O'Brien, 160; G. O. 111, Army of the Potomac, 1862.

A charge under this Article, involving as it does an imputa of disgraceful or dishonorable conduct, and entailing, upon viction, the penalty of dismissal, should not wantonly be pre red.[1] An officer carelessly making this accusation against ano renders himself liable to have his action severely animadve upon by the court or reviewing authority, or, in a proper cas be himself brought to trial for initiating a causeless and injur prosecution.[2]

Finding. That the accused, under the charge of "con unbecoming an officer and a gentleman," may, where the dence falls short of establishing the specific offence but sh the commission of a disorder or neglect, be found by the c "not guilty" but "guilty of conduct to the prejudice of g order and military discipline"—has been fully set forth in Chapter on the Finding.[3]

An acquittal under this charge, (affecting as it does the h of the accused,) is one which it may be especially proper to n "honorable" in terms.[4] Here also, where the charge has b clearly malicious or wantonly preferred, it will be especi fitting for the court to characterize it accordingly in connec with the acquittal.[5]

Sentence. The Article makes mandatory the sentence of missal upon conviction. This injunction is construed to m not only that dismissal must in every case be adjudged[6] but no other punishment may be adjudged in connection with The Article being thus exclusive, a sentence under it, which sumes to impose any other penalty in addition to dismissal, is

1. See remarks of Gen. Meade in G. C. M. O. 45, Army of the P mac, 1864.

2. Hough, 505, 533.

3. Chapter XIX, p. 544.

4. Hough, 504.

5. Hough, 504–5, 533–4; James, 35, 203, 727.

6. This sentence must be adjudged though the majority of the c may prefer a lighter one. "The *law* in this case affixes the punishm and it is the province of the revising power, and not that of the co to mitigate it according to circumstances." G. O. 41 of 1852. Wh the court regard the mandatory sentence as disproportionately se for the offence, the members may annex to the record a recommenda that the punishment be mitigated.

to such additional penalty, invalid and inoperative, and will properly be, so far, disapproved.[1]

XXVII. THE SIXTY-SECOND ARTICLE.

[CONDUCT TO THE PREJUDICE OF GOOD ORDER AND MILITARY DISCIPLINE.]

"ART. 62. *All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general, or a regimental, garrison, or field-officers' court-martial, according to the nature and degree of the offence, and punished at the discretion of such court.*"

General Purpose and Use. This provision, taken originally from the British military law,[2] was in substance incorporated in our first code of 1775, and has similarly appeared in each subquent issue of our Articles of war.[3] As will be illustrated in construing its separate terms, its evident purpose was to provide for the trial and punishment of any and all military offences not expressly made cognizable by courts-martial in the other and more specific Articles, and thus to prevent the possibility of a failure of justice in the army.[4] In practice, the greater number of the charges that are preferred against soldiers, and a large proportion of those preferred against officers, are based upon this, the "*general*" article of the code. Wherever the offence committed is

1. See G. C. M. O. 396 of 1865; DIGEST, 41.

2. In the Articles of the Earl of Essex, (1642,) the form is—"*All other faults, disorders and offences, not mentioned in these Articles, shall be punished according to the general customs and laws of war.*" In Art. 64 of the Code of James II the provision is worded as follows:—"*All other faults, misdemeanors and disorders, not mentioned in these Articles, shall be punished according to the laws and customs of war and discretion of the Court-Martial; Provided that no punishment amounting to the loss of life or limb be inflicted upon any offender in time of peace, although the same be allotted for the said offence by these Articles and the laws and customs of war.*"

3. The only material change has been the mention, in the Article of 1874, of the field officer's court.

4. A corresponding provision is contained in the Naval code in Art. 22.

one not certainly, or fully, designated or described in some c particular Article, or where, though so designated, no pu ment is assigned for its commission, or where it is dou under which of two or more Articles the offender shoul prosecuted, recourse is had to this comprehensive and ser able provision as the authority and foundation for the ch and proceedings.[1]

Construction—*"All crimes."* The term "crimes," i ordinary sense, imports, in the language of Bishop,[2] "those w which the government notices as injurious to the public, and ishes in what is called a criminal proceeding in its own na As employed in the present Article, where it is evidently distinguished as indicating a separate class of acts from the orders and neglects next named, this word is understood fer to the crimes—felonies other than capital and misdemean created or made punishable by the common law or the statut of the United States.[3] These civil crimes,—when and *pro* as will presently be more particularly noticed, they are con ted under circumstances rendering them prejudicial not o good order but also to military discipline,—the Article c tutes military offences, and authorizes their trial and punish by military courts. And, in time of *peace*, it is only or ma under this Article that such crimes are so cognizable; the

1. "It will be obvious that there is scarcely any impropriety o duct, or irregularity, which an officer or soldier may commit, tha not be brought under" this Article. Kennedy, 34. "It is the useful of the whole." Napier, 59.

2. 1 Crim. Law § 32.

3. The term "crimes" is thus used in a sense similar to that in it is employed in Art. 59, (see under that Article, *ante;*) as also Constitution. (See *In re* Fetter, 3 Zabr. 311.) O'Brien writes, p. 16 "The crimes must be such as declared by the known criminal law land: the court are not authorized to legislate or to declare that criminal which the ordinary civil law has not thus declared." In *v.* Owen, 9 B. & Cres., 579, the term "crimes," as used in the sponding British Article, is held to mean civil crimes and misdeme

4. Larceny and embezzlement of public property are punis under Art. 60; and under Art. 61 an officer may in some cas charged with a civil crime as "conduct unbecoming an officer gentleman." Otherwise it is only under Art. 62 that such crimes when affecting military discipline, be taken cognizance of. See Dr 27, 37, 42.

diction conferred by Art. 58 being limited in its exercise to time of *war*, &c.

"Not capital." The Article, by these words, expressly excludes from the jurisdiction of courts-martial, and, by necessary implication, reserves for the cognizance of the civil courts, (in time of peace,) all capital crimes of officers or soldiers under whatever circumstances committed—whether upon or against military persons or civilians. By *capital* crimes is to be understood crimes punished or made *punishable* with death[1] by the common law, or by a statute of the United States applicable to the case,—as, for example, murder,[2] arson, or rape.

The exclusion being absolute, the capital crime, however nearly it may have affected the discipline of the service, cannot be any more legally adjudicated *indirectly* than *directly*. A court-martial cannot take cognizance of a case of homicide charged as "manslaughter" or otherwise when the averments of the specification set forth a case of murder. So where, the specification being incomplete or ambiguous, the *evidence* on the trial shows the act thus charged, or charged as "conduct to the prejudice," &c., to have been in fact a murder, the court should refuse to proceed, or, if it assume to do so and to find or sentence, its proceedings should be disapproved as *coram non judice* and void in law.[3]

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1. See Chapter XVIII—"Testimony by Deposition."

2. In G. C. M. O. 3 of 1871, in a case of a conviction of an offence amounting to murder charged under this Article, it is announced by the Secretary of War that—"the proceedings are set aside as null and void, for the reason that murder, being a capital crime, is not legally cognizable by a court-martial." And to a similar effect, see G. O. 18, Dept. of the Mo., 1861; Do. 104, Army of the Potomac, 1862; Do. 17, Dept. of Va., 1863; Do. 89, Dept. of the Gulf, 1863; Do. 14, Dept. of Dakota, 1868; G. C. M. O. 28, Dept. of Texas, 1875; 1 Clode, M. F., 519; Harcourt, 61; VII Opins. At. Gen., 334; DIGEST, 42. And compare G. O. 68, A. & I. G. O., Richmond, 1863.

3. In G. C. M. O. 28, Dept. of Texas, 1875, in a case of a soldier convicted of a homicide of another soldier, charged under this article as "manslaughter," but alleged in the specification to have been committed with malice, the reviewing authority, Gen. Ord, disapproved the proceedings relating to this charge and specification "as null and void *ab initio;* the actual offence, as set forth in the specification and established by the proof, being premeditated murder, and therefore not cognizable by a general court-martial under the 99th (now 62d) Article. This principle"—it is added—"has been enunciated by the Judge Advocate General in similar cases and has been concurred in by the Sec-

"All disorders and neglects." In this comprehensiv are included all such insubordination; disrespectful or ins language or behaviour towards superiors or inferiors in violence; immorality; dishonesty; fraud or falsification; dr turbulent, wanton, mutinous, or irregular conduct; violat standing orders, regulations, or instructions; neglect or e of official or routine duty, or failure to fully or properly p it;[1]—in fine all such "sins of commission or omission,"[2] part either of officers or soldiers as, on the one hand, do n within the category of the "crimes" previously designate on the other hand, are not expressly made punishable in the other ("foregoing") *specific* Articles of the code, whi being clearly prejudicial to good order and military discipl

Neglect with reference to orders. It has alread noticed, in considering Art. 21, that a neglect to comply standing order or direction, as well as a mere failure— tinguished from a deliberate refusal or omission—to obey tive or special order, is in general properly charged not the 21st but under the present Article.[3]

Drunkenness as a disorder. Among "disorders," be noted here that simple *drunkenness* is in general a m offence in violation of this Article, whether committed by cer or soldier. Samuel[4] declares:—"It is not to be unde that drunkenness of itself is not a crime in the contempla

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retary of War." A ruling to a similar effect was made by the Se in May, 1873, in a case, (promulgated in G. C. M. O. 21, Dept. 1873,) where the charge was "Homicidal violence, to the preju good order and military discipline." And see DIGEST, 42.

In a few cases indeed where the accused, though charged wit der, has been acquitted, or convicted of manslaughter only, t ceedings, apparently from considerations of justice, have been ap by the reviewing officer. See instances in G. C. M. O. 45, D Texas, 1871; Do. 2, Id., 1872. But an accused, thus convicted, be entitled, if raising the question, to have the entire proceedin clared void and inoperative.

1. "Neglects" include "the improperly executing an order the not taking proper precaution, or doing the best according ability and judgment of the party." Hough, 633.

2. Hough, (P.) 270.

3. DIGEST, 9, 10.

4. Page 552. "Mere private drunkenness, with no act beyond indictable at the common law. * * * Still the common law

the law martial. On the contrary it has always been a more heinous offence in the military than in the civil code." Hough[1] remarks that—"it ought never to be absent from the recollection of the soldier that drunkenness constitutes of itself a breach of military discipline." So, in reviewing a case of an officer,[2] Gen. Crook well observes: "Drunkenness by persons in the military service is an offence against good order and military discipline whenever and wherever it occurs." And it has been repeatedly held in the General Orders that drunkenness, not on duty, is conduct to be charged under the present Article.[3] There can indeed rarely be an occasion when a soldier, or an officer, in camp or at a military post, may become intoxicated, and thus incapacitated for properly answering a call for duty, without rendering himself liable to be treated as an offender within the terms of Art. 62. Whether the act, when committed under other circumstances, as where the party is at a station which is not a military post, or is travelling, or is on a pass, &c., may properly be charged as a military offence, will depend upon the relation and effect which such act may have, under the circumstances, to the military service and upon military discipline.

"To the prejudice of good order and military discipline." This descriptive phrase is so familiar to military persons that it hardly need be explained that "prejudice" is used here in the sense of detriment, depreciation or injuriously affecting.

The term "good order,"—inasmuch as most of the cases contemplated by the Article are cases of *military* neglects and disorders,—may be regarded as referring mainly to the order—*i. e.* condition of tranquillity, security and good government—of the military service.[4] Inasmuch, however, as civil wrongs, such as

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ways regarded drunkenness as being in a certain sense criminal. * * * Our jurisprudence deems it *malum in se.*" 1 Bishop, C. L. § 399, 403. Compare Chapter XVII, as to Drunkenness as a Defence.

1. Page 95. And see Harcourt, 54.

2. In G. C. M. O. 47, Dept. of the Platte, 1876.

3. See cases in G. O. 14, Dept. of the Mo., 1864; Do. 131, Second Mil. Dist., 1867; Do. 5, Dept. of the South, 1868; G. C. M. O. 75, 78, of 1877.

4. The term is commonly applied in this sense, and as being practically analogous to *discipline*, in the General Orders. See G. C. M. O. 3 of 1871; Do. 27, Dept. of the Platte, 1875; G. O. 59, Dept. of Washington, 1866; Do. 96, Dept. of the Cumberland, 1868; also XVI Opins. Ar. Gen., 578, (referring to the corresponding naval Article.)

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or camp-follower; forgery of the nam
slaughter, assault with intent to kill,

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1. DIGEST, 42. And see Samuel, 687
Harcourt, 58; O'Brien, 163; XVI Opins.
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orders on the post trader.

3. And so of criminal *attempts* and *con*
soldier to poison his wife, (G. C. M. O. 23
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the Miss., 1865;) a conspiracy of two sold
(G. C. M. O. 28, Dept. of the Mo., 1880.)
ing and abetting in crime. (G. C. M. O. 5

d upon a military person; inasmuch as they directly affect ary relations and prejudice military discipline, may properly s they frequently have been—the subject of charges under resent Article. On the other hand, where such crimes are itted upon or against *civilians*, and not at or near a military or post, or in breach or violation of a military duty or or- hey are not in general to be regarded as within the descrip- of the Article, but are to be treated as civil rather than mil- offences.[1]

DIGEST, 43. In the early G. O. 22 of 1833, a charge which set simply a stealing without describing it as in any manner affecting tary person or the public service, was held not to allege a military e, and the conviction thereon was disapproved. In G. O. 59, Dept. ashington, 1866, Gen. Canby well observed, in regard to theft of e property, that it—"is not a military crime *per se*, but only as it , and to the extent that it does affect, the good order and discipline command in which it was committed." And to the same effect, see 8, Dept. of the Columbia, 1872. In a case in G. C. M. O. 58, Dept. Platte, 1872, where the accused was charged with and convicted 'heft, to the prejudice of good order and military discipline, in g property of a civilian," Gen. Ord, in disapproving the proceed- adds: "The specification does not allege a military offence." The is "one against the civil law, and not against any law or regula- governing the military." In G. C. M. O. 27, Dept. of the Platte, in a case where the offence consisted in an embezzlement of money vilian, Gen. Crook, in disapproving the findings, &c., says: "The edings fail to exhibit any offence to any person or thing connected he military service. Therefore the jurisdiction of the court-martial he case fails. The evidence does not show that the person, (the n named in the specification,) was related to or connected with the ry service in any capacity whatever. The 'crimes, disorders, and ts,' referred to" in this Article "are such only as affect the good and discipline of the military service." [Citing DIGEST.] In G. Dept. of the Cumberland, 1867, Gen. Thomas disapproves the edings in two cases in which the accused were charged with assault attery with intent to kill, robbery and rape, committed upon civil- on the ground that the offences were "of a purely civil character," ich as called for the action of a "civil tribunal." In Bird's case, M. O. 3, War Dept., 1871,) already referred to as one of murder, nounced by the Secretary of War, as one of the grounds upon the proceedings are set aside, that the accused, at the time of his e, "held no such practical relations to the military service as to ct his acts with its good order or discipline." And see G. C. M. Dept. of the Mo., 1869; Do. 5, Dept. of Texas, 1871; Do. 85, of Dakota, 1874.

erwise, where the crime, though committed against a civilian, is violation of orders and breach of military duty. Thus, in *Ex parte* , 105 U. S., 698, the Supreme Court, in holding that the offence ed was "not only a crime against society but an atrocious breach

A strict rule on this subject, howe
in practice; and, especially as the civ
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Do. 35, Dept. of the Gulf, 1875; Do. 46,
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generally been regarded as a fact going
cognizable under this Article.
In a recent case of this class, promulga
the Columbia, 1885, in which the proceedi
by the Dept. Commander, (Gen. Miles,
raised as to whether the court had prope
robbery by soldiers of civilians on the ro
Vancouver Barracks, W. T. An elaborat
of his action in the case was thereupon pub
action was held to be legal and regular b
General, Col. Lieber, (to whom the quest
opinion of Aug. 10, 1885. This opinion
of War on Nov. 20th following, and the ju
finally sustained.

2. Page 688. And see Id., 689.

provided for." Or, as Coppée[1] observes,—"This Article is intended to be supplementary to all the others, and to provide a general charge under which every possible kind of offence not provided for may be ranged."

This very general description of the offences within the scope of the Article, as being simply those which are "not mentioned" in the other Articles, is characteristic of the military as distinguished from the civil code where all offences are separately defined. Its indefiniteness, however, presents little difficulty to the student of military law who has familiarized himself with the precedents contained in the General Orders.[2]

It is to be observed of the term "not mentioned in the foregoing articles," that it embraces not only offences wholly distinct from and outside of previous designations and enumerations, but also, (1) acts which, while of the same general nature as those included in certain specific Articles, are wanting in some single characteristic which distinguishes the latter,—as, for example, the disrespectful behaviour to a superior who is not a commander, the disobedience of the orders of a non-commissioned officer, the mutinous conduct, the drunkenness *off* duty, and the embezzlement or misappropriation of *private* property, heretofore referred to as *not* included within Arts. 20, 21, 22, 38 and 60 respectively; as also acts similar to those described in Arts. 3, 5, 8, 14, 15, 16, 27, 50 and 60, but which lack the *gravamen* expressed in the term, "knowingly," "wilfully," or the like; (2) acts which, though in terms or in effect *prohibited* in other Articles, are not expressly made punishable thereby—such as the acts or neglects indicated in Arts. 4, 9, 10, 11, 12, 25, 29, 30, 67, 70, 84, 85, 87, 127, and, in part, in Arts. 54 and 55; and (3) acts made specifically punishable in other Articles but only when committed by

1. Page 88. To a similar effect, see Hough, 630; Harcourt, 58; O'Brien, 165. It is the fact that the Article provides for the punishment of offences which the other specific Articles have failed to embrace—thus rendering it impossible for the soldier to escape the consequences of any military offence which he may commit—that has given it the name in the British army of the "Devil's Article."

As apposite to the term "foregoing," it may be remarked that the present Article, (unlike Art. 99 of 1806,) is not in the proper place in the code. It should have been inserted after *all* the Articles setting forth specific offences, and therefore after Arts. 65, 68 and 69.

2. See the remarks of the Supreme Court in Dynes *v.* Hoover, 20 Howard, 82, in reference to the corresponding Article of the naval code.

persons of a grade other than that of the accused,—as, for e ple, absence without leave by officers, and breach of arre soldiers, which are not included in Arts. 32 and 65, because Articles relate to offences by enlisted men and officers res ively, only.[1]

Illustrations of Neglects and Disorders charged u the Article. As indicating the species of offences, other "crimes," which, in practice, have been brought to trial u Art. 62, it will be instructive to note some of the more point the many and varied instances of "neglects" and "disord to the prejudice of good order and military discipline, publ in the General Orders, or referred to by military authoritie follows:—

In cases of officers. Failing without excuse to be presen his command, or to exercise command, on occasions of duty

Failing to suppress, or to attempt to suppress, disorders i command.[4]

Failing to restore and maintain the public peace on the sion of a riot which he was called upon to suppress.[5]

Abuse of authority in assaulting, or illegally inflicting pu ment upon, soldiers.[6]

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1. This class of acts, as properly chargeable under the correspo British Article, is noticed in Mann *v.* Owen, 9 B. & Cres. 600.

2. The acts specified do not include of course the manifold pe fences of soldiers, such as absences without leave, ordinary breac duty, drunken and disorderly behaviour, &c., habitually tried an posed of by the inferior courts-martial.

3. G. C. M. O. 39 of 1877. And see Do. 38, 58, Id.; DIGEST, also case in Do. 50, 59, Navy Dept., 1882, (under the correspo Article,) of an officer who left his command without authority, wh epidemic, (yellow fever,) was impending. Absence without lea officers of the army, is in general properly chargeable under this A See *ante*—"Thirty-Second Article."

4. G. O. 3, Dept. & Army of the Tenn., 1877; Do. 5, Dept. Mo., 1864; Hough, (P.) 187.

5. Case of Lt. Col. Brereton and Capt. Warrington, charged wit lect of duty at the "Bristol Riots" in 1831. (Col. Brereton com suicide pending the trial; Capt. Warrington was sentenced to be iered.) Hough, (P.) 578–584; Clode, 2 M. F., 478.

6. G. O. 81 of 1822; Do. 8 of 1826; Do. 28 of 1829; Do. 2, 17, 1843; Do. 39 of 1845; G. C. M. O. 80, 114, of 1875; Do. 112, Dept. East, 1870; Do. 50, Dept. of the Mo., 1871; Do. 35, Dept. of Texas, Do. 39, Id., 1874; Do. 33, Id., 1876; G. O. 9, Div. of the Atlantic,

Allowing a soldier to go on duty when known to be materially under the influence of liquor.[1]

Employment of soldiers for personal, or other illegal uses.[2]

Exceeding limits of arrest.[3]

Rendering himself unfit for duty by excessive use of spirituous liquors.[4]

Joining with other inferior officers of the regiment in a communication to the colonel, requesting him to resign.[5]

Tendering his resignation in disloyal language.[6] Expressing disloyal sentiments.[7]

Publications, in newspapers, pamphlets, &c., of strictures upon the acts or conduct, official or personal, of other officers.[8]

Taking part in meetings convened for the purpose of expressing disapprobation of the orders or acts of superiors.[9]

Betting at cards by a disbursing officer.[10]

Do. 5, Id., 1870; Do. 20, Div. of the Pacific, 1869; Do. 53, Dept. of Va. & No. Ca., 1864; Do. 22, Dept. of the Platte, 1867. And see G. O. 23 of 1824; Do. 34 of 1842; Do. 4 of 1843; Do. 2 of 1844; Do. 32, Div. of the Pacific, 1867; Hough, 634. See also G. O. 2 of 1861, for a case of a conviction of an officer for the arbitrary imprisonment and ill-treatment of a sutler. And note case in G. C. M. O. 7 of 1880, of harassing junior cadets.

1. G. C. M. O. 29, Dept. of Texas, 1881.

2. G. C. M. O. 65, of 1874. And see the case of employment, for private purposes, of freedmen under military protection, in G. C. M. O. 213 of 1866.

3. See G. C. M. O. 37, Dept. of Texas, 1874.

4. G. C. M. O. 58 of 1879; Do. 64 of 1880; Do. 49 of 1883.

5. DIGEST, 44. And see case in G. C. M. O. 116, Dept. of the East, 1884, of a conspiring by two officers to injure their commanding officers, found as an offence under this Article.

6. G. O. 35, Dept. of the Tenn., 1863.

7. G. O. 242, 377, of 1863; Do. 38, Middle Dept., 1863; Do. 35, Dept. of the Tenn., 1863; Do. 76, Dept. of Washington, 1865; Hough, 634.

8. G. O. 150 of 1863; G. C. M. O. 26 of 1878; Do. 35 of 1879; Do. 37 of 1885; G. O. 20, Dept. of W. Va., 1863; DIGEST, 44, 458. And see Lieut. Kennon's Trial, p. 8.

In connection with these cases may be noticed those of making alleged false or injurious official statements, preferring false charges, and the like, charged as violations of Art. 61, but *found* as offences under Art. 62. See G. C. M. O. 71 of 1879; Do. 51 of 1882; Do. 19 of 1885; Do. 116, Dept. of the East, 1884.

9. Harcourt, 95.

10. G. C. M. O. 18 of 1871. And see DIGEST, 46, as to speculating by a disbursing officer.

Fighting a duel.[1] Inciting another officer to challenge him to a duel.[2]

Altercation with another officer in the presence of inferiors.[3]

Disrespectful and insulting language to a superior officer, in the presence of officers and soldiers, while all were held confined as prisoners of war by the enemy.[4]

Interference with or disrespect toward a sentinel.[5] Treating with disrespect and contempt an officer of the provost guard at Washington.[6]

Gambling, or otherwise demeaning himself, with enlisted men.[7]

Entering into illegal combinations with other officers or soldiers.[8]

Causing troops to be transported on a steamer known to be unsafe.[9]

Neglecting the sick, or culpable malpractice, by a surgeon.[10]

Inexcusable neglect by a chaplain to perform funeral services.[11]

Ordering a garrison court to try a capital offence, and putting the members in arrest because the court decided it had no jurisdiction of the same.[12]

As a *member of a court-martial*—improperly disclosing the proceedings had in secret session;[13] refusing to vote a punishment after conviction;[14] appearing drunk before the court, or behaving disrespectfully to the court:[15] As a *witness*—failing to comply

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1. DIGEST, 14.
2. DIGEST, 45.
3. G. O. 169, Dept. of Washington, 1865.
4. G. C. M. O. 425 of 1865.
5. DIGEST, 454.
6. G. O. 3, Army of the Potomac, 1861.
7. G. O. 46 of 1848. And see Do. 88, Army of the Potomac, 1862. (Sometimes charged under Art. 61—see that Article—*ante*.)
8. G. C. M. O. 602 of 1865. (Case of Bvt. Brig. Gen. Briscoe.)
9. DIGEST, 45.
10. G. O. 64 of 1827; Do. 3 of 1856; G. C. M. O. 18 of 1877; Hough, (P.) 275.
11. G. O. 96, Army of the Potomac, 1862.
12. G. O. 10 of 1857. (Capt. Howe's case.)
13. G. C. M. O. 113, Dept. of the Mo., 1868.
14. See Hough, (P.) 277–9; DIGEST, 447.
15. See G. O. 1 of 1858; G. C. M. O. 9, Fourth Mil. Dist., 1867.

with a summons;[1] testifying falsely under oath;[2] using disrespectful language, or behaving disrespectfully or contumaciously to the court:[3] As an *accused*, (or *counsel* for an accused,) transcending the privilege of the defence or "statement" by indulging in unwarrantable strictures upon a superior officer, or gross personalities;[4] attempting to suborn[5] or to intimidate[6] witnesses.

Contempt of court, where not punished summarily under Art. 86.[7]

Neglect of official duties, in leaving the preparation of vouchers, payment of employees, &c., to an unfaithful clerk.[8] Neglect of public animals in his charge.[9] Neglect of duty and inefficiency in service against Indians.[10] Neglect to make proper investigation as member of board of survey.[11]

Violation of special paragraphs of the Army Regulations,[12] as of—Par. 87, in failing to report address when on leave of absence;[13] Par. 649, in addressing application direct to the Secretary of War instead of through proper military channels;[14] Pars. 865 and 867, in arresting and confining in the guard-house a medical officer for a trivial offence;[15] Par. 349, in showing disrespect to a sentinel by setting at naught his authority and attempting to disarm him;[16]

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1. G. O. 190, Fifth Mil. Dist., 1869.

2. G. O. 77, Dept. of Va. & No. Ca., 1864.

3. G. O. 14 of 1855; Do. 126, Sixteenth Army Corps, 1863. And see Do. 48, Dept. of the East, 1863; also case in G. C. M. O. 23 of 1873, of a *cadet* convicted of refusing to answer a proper question as a witness.

4. G. O. 25 of 1859; G. C. M. O. 5, Dept. of the Platte, 1874.

5. G. O. 25, Mountain Dept., 1862. More properly charged under Art. 61.

6. G. C. M. O. 13, Dept. of Texas, 1876.

7. DIGEST, 70. And see Samuel, 634; Simmons § 434.

8. G. C. M. O. 10 of 1878.

9. G. C. M. O. 34 of 1879.

10. G. C. M. O. 30 of 1877; Do. 36, 62, of 1879; Do. 33 of 1880.

11. See G. C. M. O. 36 of 1877; Do. 73, 74, Dept. of the Mo., 1869.

12. That violations of Regulations are in general properly to be charged under Art. 62—see DIGEST, 45, 118, 138. [The Pars. referred to in the text are designated by their *present* numbers.]

13. G. O. 43 of 1832.

14. G. C. M. O. 84 of 1882. And see similar cases in Do. 28 of 1880; Do. 116, Dept. of the East, 1884.

15. G. O. 251 of 1863; Do. 59, Dept. of the South, 1862.

16. G. O. 9, Fifth Mil. Dist., 1870. And see case in G
the Potomac, 1861; also Hough, 635.

Par. 1635, in taking, as quartermaster, receipts from employees for money not actually paid them;[1] Par. 1628, in gambling as a disbursing officer;[2] Par. 1629, in being, as a quartermaster, interested with civilians in a sale to the United States of quartermaster stores;[3] also, in receiving presents for the transaction of public business;[4] Par. 1632, in contracting for and purchasing, as quartermaster, public stores from persons in the military service;[5] Par. 2380, in transferring a pay account before the pay was due;[6] and of the recruiting regulations, in making improper enlistments.[7]

In cases of soldiers. Special neglects or violations of duty on guard, as—Omission to challenge, in time of war;[8] Allowing prisoners to escape;[9] Bringing whiskey into guard-house;[10] Improperly relieving sentinels by non-commissioned officer of the guard;[11] Gambling by sergeant of the guard with members of the guard;[12] Mutilating the guard book.[13]

Escape while in confinement under arrest, or under sentence.[14]

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1. G. C. M. O. 52 of 1867. Offences of this nature are now expressly made punishable in Art. 60.

2. G. C. M. O. 553 of 1865; Do. 66 of 1875. And see G. O. 5 of 1829; Do. 104 of 1833; also case cited in note 10, page 1045, *ante*.

3. G. C. M. O. 6 of 1867.

4. G. O. 22, Northern Dept., 1865.

5. G. C. M. O. 89 of 1866.

6. G. C. M. O. 64 of 1867. And see G. O. 110, Fifth Mil. Dist., 1869; G. C. M. O. 42, Dept. of Texas, 1884.

7. G. O. 18, Dept. of the East, 1864.

A common form of Charge against *Cadets* is—Violation of a certain paragraph of the Regulations for the Military Academy. This is really a charge under Art. 62; the term, "to the prejudice of good order and military discipline," being understood if not expressed.

8. G. O. 1, Dept. of N. Mex., 1864; Do. 13, Dept. of the Pacific, 1863.

9. G. C. M. O. 56 of 1877; Do. 53 of 1879; Do. 42 of 1882; Do. 4 of 1883; Do. 33, Dept. of the Mo., 1883; Do. 7, 16, 28, 31, Id., 1884; Do. 63, 64, Dept. of Cal., 1884.

10. G. O. 90, Fifth Mil. Dist., 1869; G. C. M. O. 7, Dept. of the Platte, 1875.

11. G. O. 11, Dept. of Alaska, 1868.

12. G. C. M. O. 8, Dept. of Texas, 1874.

13. G. C. M. O. 123, Dept. of the Mo., 1872.

14. G. C. M. O. 84, Dept. of the Mo., 1873; Do. 29, Dept. of the Platte, 1875.

Attempt to desert.[1]

Failing to appear on duty with a proper uniform, or appearing with dirty or torn clothing, &c.;[2] Being offensively unclean in person.[3]

Failing to appear, or appearing drunk, before a court-martial, as an accused or as a witness;[4] Giving false testimony before a court-martial;[5] Attempting to suborn a witness;[6] Attempting to intimidate one who was to be a material witness by a threatening letter.[7]

Malingering or self-maiming.[8] Maiming of another soldier.[9]

Cruel or injurious treatment of a public animal.[10]

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1. G. C. M. O. 20, Dept. of the Platte, 1875. All *attempts* to commit military offences, or attempts to commit civil crimes cognizable at military law, are properly charged under this Article.

2. G. O. 84, First Mil. Dist., 1869.

3. G. C. M. O. 43, Dept. of the Platte, 1873.

4. G. O. 49, Dept. of the Lakes, 1868; Do. 58, Dept. of the Cumberland, 1868; Do. 149, Fifth Mil. Dist., 1869; G. C. M. O. 7, Dept. of the Platte, 1874.

5. G. C. M. O. 16, 66, of 1879; G. O. 22, Second Mil. Dist., 1867; Do. 33, Third Id., 1867; Do. 155, Fifth Id., 1869; Do. 6, Dept. of the East, 1869; Do. 41, Dept. of the South, 1870; Do. 7, Dept. of the Gulf, 1874; Do. 48, Dept. of the Platte, 1867; Do. 3, Id., 1869; Do. 1, Id., 1871; G. C. M. O. 73, Id., 1873; Do. 146, Dept. of the Mo., 1868; Do. 53, Dept. of Texas, 1872; Do. 6, Id., 1874; Do. 8, 17, Id., 1875; Do. 48, Dept. of Cal., 1874. A leading case of alleged "False swearing, to the prejudice of good order and military discipline," is that of Cadet Whittaker, in G. C. M. O. 18 of 1882.

6. G. O. 48, Dept. of the Platte, 1867; G. C. M. O. 48, Dept. of Cal., 1874.

7. G. C. M. O. 13, Dept. of Texas, 1876.

8. G. C. M. O. 29, Dept. of the Mo., 1869; Do. 86, Id., 1882; Do. 171, Dept. of the East, 1871; Do. 10, Dept. of the Gulf, 1872; Do. 18, Dept. of Texas, 1873; Do. 20, 23, 52, Id., 1874; Do. 1, 3, Id., 1875; Do. 105, Dept. of the East, 1884; Hough, 637.

9. G. O. 38, Dept. of Dak., 1874; G. C. M. O. 86, Dept. of Texas, 1870; Do. 36, Dept. of the Platte, 1871; Do. 103, Dept. of the Mo., 1881. These were all cases of biting off a portion of the *ear*, and therefore not mayhem at common law. See "Fifty-Eighth Article—Mayhem," in Chapter XXV.

10. G. C. M. O. 513 of 1865; Do. 67 of 1879; Do. 48 of 1882; Do. 57, Dept. of the Mo., 1873; Do. 100, Id., 1882; Do. 5, Dept. of Texas, 1873; Do. 7, Id., 1874; Do. 29, Dept. of Cal., 1873; Do. 12, Id., 1875; Do. 100, Id., 1884; Field G. O. 1, Id., 1867; G. O. 15, Dept. of Dakota, 1868.

Careless or wanton discharge of fire-arm, so as to endanger man or animal.[1]

Assuming by a soldier to be a corporal in the recruiting service, and acting as such in enlisting recruits, &c.[2]

Falsely personating and acting as an officer.[3]

Writing, and publishing in a newspaper, statements grossly defaming and misrepresenting the military service.[4]

Abusing and maltreating his wife in the presence of other soldiers at a military post.[5]

Failing properly to deliver the mail,[6] or opening the mail,[7] by a soldier detailed as mail carrier.

Straggling on the march.[8]

Failing, by a hospital steward, to put up prescriptions correctly.[9]

Combining and holding meetings in a spirit of insubordination against superior authority.[10]

Writing an improper complaining letter to the colonel of the regiment without first presenting his grievance to his company commander.[11]

Engaging by a non-commissioned officer in a public sparring exhibition at a liquor saloon.[12]

Joining and parading with an association of Fenians, reported to be in armed hostility to a nation at peace with the United States.[13]

All such acts, (not classed as "crimes," nor made punishable in previous Articles,) as, in a case of an officer, would be within the description of Art. 61; as, for example,—Falsifying morning

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1. G. C. M. O. 147, Dept. of the Mo., 1868; Do. 26, Id., 1872; Do. 76, Id., 1873; Do. 24, Dept. of Texas, 1876; Hough, 638.
2. DIGEST, 45.
3. G. C. M. O. 479 of 1865.
4. G. C. M. O. 52, Dept. of Columbia, 1881.
5. G. C. M. O. 10, Dept. of the Platte, 1881.
6. G. O. 17, Dept. of Dakota, 1874.
7. G. C. M. O. 42 of 1878; G. O. 26, Dept. of N. Mexico, 1864.
8. G. C. M. O. 357 of 1864; G. O. 27, Dept. of Dakota, 1868.
9. G. C. M. O. 50, Dept. of Texas, 1873. And see G. O. 54, Dept. of Washington, 1863.
10. See G. C. M. O. 62, Dept. of Texas, 1873.
11. G. C. M. O. 40, Dept. of Cal., 1874.
12. G. C. M. O. 88, Dept. of Cal., 1884.
13. G. O. 54, Dept. of the East, 1867.

›ort book, company clothing book, muster-rolls, &c., by a com-
ıy clerk, hospital steward, &c.;[1] Forging the name of an offi-
to a pass or furlough,[2] order on the trader,[3] ration return,[4]
.; Embezzlement of private property,[5] or other misappropria-
n or fraud not included in Art. 60; Making false statements to
officer;[6] Preferring charges against an officer or soldier;[7]
ıhonorable non-payment of a debt;[8] Borrowing property of
›ther soldier and not returning same;[9] Obtaining money from
oldier's wife on false pretences;[10] Improper conduct to a laun-
:ss,[11] or to a milk-woman;[12] Violating a pledge given to a com-
.nding officer, (in consideration of a release from arrest or the
:hdrawal of charges,) not to drink intoxicating liquor during
: remainder of a term of enlistment or other period.[13]

Procedure—*Charge.* This particular is sufficiently com-
sed under the general subject of the Charge as considered in
apter X. It may be repeated that, while the usual and ap-

. G. C. M. O. 50, Dept. of the Platte, 1874; Do. 31, Id., 1875; Do. Dept. of Texas, 1876.

:. G. C. M. O. 224 of 1865.

;. G. C. M. O. 36, Dept. of the Mo., 1870; Do. 7, Dept. of the Platte, '3; Do. 45, Dept. of Texas, 1875.

.. G. C. M. O. 36 of 1866.

;. G. C. M. O. 9, Dept. of the Platte, 1874; Do. 28, Dept. of Arizona, ›o.

›. G. C. M. O. 79, Dept. of Texas, 1873; Do. 16, 42, Id., 1874; Do. Dept. of the Platte, 1872; Do. 35, Id., 1875; Do. 25, Dept. of the Gulf, '5.

False statements made *upon enlisting*, *i. e.* before the contract of en-
ment is completed and the civilian has actually become a soldier, are
: chargeable as military offences under this Article, or otherwise, in
· law. See DIGEST, 46; G. C. M. O. 9, Dept. of Texas, 1874.

·. G. O. 16, Mountain Dept., 1862.

›. G. O. 36, Dept. of the Platte, 1868; Do. 37, Id., 1871. The act, how-
:r, should be such as to affect military discipline. The mere non-pay-
:nt of a debt to a citizen is not sufficient. G. C. M. O. 36 of 1883.

9. G. C. M. O. 50, Dept. of the Platte, 1872.

:o. G. C. M. O. 60, Dept. of the Mo., 1870.

:1. G. C. M. O. 7, Dept. of the Platte, 1876.

:2. G. C. M. O. 106 of 1866.

3. G. O. 63, Dept. of Dakota, 1872; Do. 30, Dept. of the Gulf, 1875; C. M. O. 32, Id., 1876; Do. 65, Dept. of the Mo., 1869; Do. 8, Dept. the Platte, 1876; Do. 30, Id., 1875; Do. 48, Id., 1873; Do. 6, 7, Id., '2; G. O. 36, Id., 1871.

proved form of the charge is "Conduct to the prejudice of good order and military discipline," this form is not an essential; and that, however the charge may be worded, if charge and specification taken together make out a substantial averment of an act which, while not representing an offence punishable under a specific Article, at the same time clearly directly impairs or injuriously affects good order and military discipline, the whole will constitute a sufficient pleading of a crime, neglect or disorder under Art. 62.[1]

Finding. It has already been sufficiently indicated in the Chapter on the Finding, that, while the established usage of the service has fully sanctioned the finding of guilty of "conduct to the prejudice of good order and military discipline" under a charge of a violation of any Article making punishable a specific offence, the reverse, *viz.* the finding of a specific offence under a general charge framed upon Art. 62, would obviously be wholly unauthorized and invalid.

Punishment. The discretionary power of punishment conferred upon the court by this Article is peculiarly appropriate in view of the manifold forms and shades of offences constantly brought to trial under it.[2]

In imposing a term of imprisonment or fine, upon the conviction of a "crime," the court, as an aid to the exercise of a due discretion, may well take into consideration the measure of the penalty of this nature imposable for a like offence under the statutes of the United States or the local law. As recognized, however, by the Supreme Court in *Ex parte* Mason,[3] a court-martial may in a proper case considerably exceed this measure, while adding, if deemed expedient, other penalties—such as discharge, dismissal and forfeiture of pay—of a military character.

It may be remarked in conclusion that where a court-martial, under a charge of a violation of a specific Article prescribing a mandatory penalty, has found the accused guilty of "conduct

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1. DIGEST, 46, 47; G. O. 23, Dept. of the Lakes, 1869.

2. The discretion "must be a reasonable one, consistent with usage and custom." Samuel, 689. "The punishment is indeterminate, because, in most cases, the guilt may be much aggravated or diminished by attendant circumstances." O'Brien, 165.

3. 105 U. S., 700. And compare King *v.* Suddis, 1 East, 306.

to the prejudice of good order and military discipline" only, it will, in general, in its sentence, naturally and properly affix a less severe punishment than that designated in the specific Article.

With the exception of Art. 99, ARTICLES 63 TO 121 inclusive have all been fully considered under appropriate heads in preceding Chapters.

XXVIII. THE NINETY-NINTH ARTICLE AND SECTIONS 1228, 1229, 1230, 1245, AND 1252, REV. STS.

[DISMISSAL AND RESTORATION OF OFFICERS.]

"ART. 99. *No officer shall be discharged or dismissed from the service, except by order of the President, or by sentence of a general court-martial; and in time of peace no officer shall be dismissed, except in pursuance of the sentence of a court-martial, or in mitigation thereof.*

"SEC. 1228. *No officer of the Army who has been or may be dismissed from the service by the sentence of a general court-martial, formally approved by the proper reviewing authority, shall ever be restored to the military service, except by a reappointment confirmed by the Senate.*

"SEC. 1229. *The President is authorized to drop from the rolls of the Army for desertion any officer who is absent from duty three months without leave; and no officer so dropped shall be eligible for reappointment. And no officer in the military or naval service shall in time of peace be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.*

"SEC. 1230. *When any officer, dismissed by order of the President, makes, in writing, an application for trial, setting forth, under oath, that he has been wrongfully dismissed, the President shall, as soon as the necessities of the service may permit, convene a court-martial, to try such officer on the charges on which he shall have been dismissed. And if a court-martial is not so convened within six months from the presentation of such application for trial, or if such court, being convened, does not award dismissal or death as the punishment of such officer, the order of dismissal by the President shall be void.*

"SEC. 1245. *When any officer has become incapable of performing the duties of his office, he shall be either retired from active service, or wholly retired from the service, by the President, as hereinafter provided.*

"SEC. 1252. *When the board finds that an officer is incapacitated for active service, and that his incapacity is not the result of any incident of service, and its decision is approved by the President, the officer shall be retired from active service, or wholly retired from the service, as the President may determine. The names of officers wholly retired from the service shall be omitted from the Army Register.*"

NINETY-NINTH ARTICLE.

History. This Article is made up of two separate enactments. Its first clause consists of a provision taken from Article 11 of 1806, and which had previously appeared in the Articles of 1776 and 1786; the only material change made in the phraseology by the later statute being that, in view of the adoption meanwhile of the Constitution, the term "by order of the President" was substituted for the previous form, "by order of Congress."

The second clause of the Article is the provision, (so far as it relates to the Army,) of the Act of July 13, 1866, c. 176, s. 5, which was expressed as follows:—"*No officer in the military or naval service shall, in time of peace,*[1] *be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof.*" This provision is repeated also in Sec. 1229, Rev. Sts., above cited, and more correctly; the word "commutation"—which, and not "mitigation," is in fact the correct legal term to employ in such connection—being there properly retained.

The Two Modes of Dismissal Distinguished. The two modes of discharge or dismissal of officers specified in the Article are quite distinct in their nature. A dismissal imposed by sentence of court-martial, (or in commutation thereof,) is a *punishment*—a penalty incurred by law upon a conviction of a criminal

1. It was held by the Supreme Court in McElrath *v.* U. S., 102 U. S. 426, that as the recent war was not fully terminated nor peace established prior to Aug. 20, 1866, this statute did not affect the legality of a summary dismissal ordered by the President between the date of the Act and Aug. 20 following.

offence. A dismissal or discharge ordered by the President in the first instance, on the contrary, is not a punishment but a *removal from office.* "A penalty," says Attorney General Cushing,[1] "is the result of a legal process. Dismissal from office belongs to a different class of administrative or political considerations, resting in the mere executive discretion of the President."

Any dismissal, indeed, where resorted to because of offences or misconduct of the officer, has the moral effect of punishment, in that it not only deprives the party of that which is valuable to him but affixes a reproach upon his reputation. The latter, however, is by no means an essential incident of an executive dismissal,[2] since—as was frequently done toward the end of the late war—an officer may be dismissed because his services are no longer required, by reason of a cessation of hostilities or other cause inducing a reduction of the military force. The separation from the service in the latter class of cases is indeed ordinarily designated "discharge" or "muster out," while the term dismissal is rather reserved for those instances which involve disgrace. But whatever be the name applied to it, or the grounds of or circumstances attending it, the exercise of the executive will is, in all the cases, the same act *in law*, the authority exerted being simply that of a divestiture of office.

That the summary dismissal is wholly distinct from and independent of the other species, *viz.* dismissal as a punishment by sentence, is illustrated by the fact that the President, like the British sovereign, has repeatedly exercised the authority to dismiss by order, not only after a court-martial, having passed upon the acts of the party and tried him for his offences, has imposed upon him a minor punishment, but after such a court has *acquitted* him altogether.[3]

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1. VII Opins. At. Gen., 251. See DIGEST, 239.

2. See Samuel, 627–8; Hough, (P.) 425, 428.

3. "The royal prerogative of summary dismissal is in nowise controlled or affected by the circumstance of an officer having been previously acquitted by a court-martial or having received only a lenient sentence for the conduct in question." Prendergast, 238. And see Id., 109, 236. Among the most marked instances in the British service were those of Admiral Herbert and Rear Admiral Munden, (1 McArthur, 109, 111; 2 Brod. & Bing. 151,) and General Fowke, (IV Campbell's Admirals, 84.) In the first two cases the officers were dismissed after having been acquitted by military tribunals; in the latter case the action

And so, after a court of inquiry,[1] or an examining board,[2] has rendered a favorable report upon his case. And that such exercise of power is entirely legal has been repeatedly affirmed by the authorities.[3]

Dismissal by Sentence. This subject has already been fully considered in Chapter XX, treating of SENTENCE AND PUNISHMENT.

Dismissal by Order—*As heretofore resorted to.* The summary dismissal or discharge of officers of the army and navy has been, from the earliest period, a prerogative of the British sovereign. "Commissions in the army," says Prendergast, "being held at the sole will and pleasure of the Crown, a royal mandate or order is at any time sufficient for the summary discharge of an officer from the service, without the formality of a court-martial or a court of inquiry, or the assignment of any reason whatsoever."[4] In this country, the power, having been employed by Congress antecedently to the adoption of the Constitution,[5]

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was taken after a sentence of suspension for one year. And see instances reported in James, pp. 72, 231, 290, 334, 345, 492, 498.

In our army, cases of summary dismissal after *acquittals* are published in G. O. 327, 385, of 1863; G. C. M. O. 33, 38, 109, 184, 278, of 1864; Do. 129 of 1865;—after sentences imposing minor punishments, in G. O. 330, 377, of 1863; G. C. M. O. 42, 144, 156, 159, 280, 293, of 1864; Do. 70, 299, of 1865.

1. IV Opins. At. Gen., 1.

2. XIII Opins. At. Gen., 3.

3. See IV Opins. At. Gen., 1, 611; XII Id., 421; 1 McArthur, 109; Prendergast, 236–239; Clode, 1 M. F., 168.

4. Page 235. The same author adds, (p. 239,)—"A military officer cannot by law hold his commission or any military employment, free from this liability to summary dismissal by the Crown." In Lieut. Poe's case it was held by the Court of King's Bench, "that the King had the exclusive uncontrolled prerogative of dismissing any officer or soldier whom he pleased, with or without a court-martial." Simmons § 750, note.

5. See instances of the exercise of the power by Congress, in 1 Jour. Cong., 357; 2 Id., 204, (a dismissal of twelve lieutenants of the navy;) 3 Id., 421. In the last case, that of Maj. Gen. Charles Lee, the Resolution follows the form of words employed in the British service, the officer being informed that "Congress has no further occasion for his services in the Army of the United States." See, further, 2 Jour. Cong., 45, where Congress directs General Washington to dismiss such of "the French gentlemen in the army" as he may find on investigation to be

was subsequently exercised by its successor in the executive department of the government, the President, from the period of the debate of 1789 on the subject, in the House of Representatives, down to the passage of the Act of 1866, already cited as the original of the second clause of Art. 99.[1]

Prior to the late war, indeed, summary dismissals or discharges of officers of the army by the order of the President, though from time to time resorted to, were not frequent.[2] But during the war —especially between July 1861 and October 1865—these dismissals and discharges were numerous; about one hundred and fifty, of officers of all grades,[3] and for varied causes,[4] being published in the General Orders,[5] and upwards of fifteen hundred in the

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"unworthy of commissions or unable to render service in the military line."

1. Atty. Gen. Clifford, writing in 1847, observes, (IV Opins., 612,) of the power under consideration, that it "has the sanction of immemorial usage in England and of more than half a century in the United States."

The power of course pertains to the President alone; a military commander cannot exercise it. An order of summary dismissal issued in the name or by the direction of the Secretary of War is presumed to be the order of the President. See XII Opins. At. Gen., 421; McElrath *v.* U. S., 12 Ct. Cl. 202; DIGEST, 240, 446.

2. See cases in G. O. 35 of 1821; Do. 23 of 1831; Do. 97 of 1833; Do. 37 of 1836; Do. 18 of 1838; Do. 51 of 1840; Do. 34 of 1841; Do. 14 of 1845; Do. 4, 18, of 1853; Do. 6 of 1856. And see Gen. Gratiot's case, (of Dec. 4, 1838,) in V Opins. At. Gen., 234.

3. Two being cases of general officers—Twiggs and Spears. See G. O. 5 of 1861; G. C. M. O. 267 of 1864.

4. Of these grounds, so far as recited—(in some cases the causes are not specified)—the following, (taken both from General and Special Orders,) are among the principal:—Disloyalty, tender of resignation, in the face of the enemy, tender of resignation under grave charges or on improper grounds, desertion, absence without leave, disobedience of orders, neglect of duty, cowardice, misbehaviour before the enemy, drunkenness, sending a challenge, embezzlement, twice drawing pay, fraudulent transactions, lying, dishonorable or unbecoming conduct, unauthorized publication of an official report, procuring or suffering one's self to be taken prisoner, pretending to be wounded, feigning sickness, self-caused disability, irregular and improper conduct as member of a court-martial, incompetency, inefficiency, being "troublesome," being "an alarmist," being in Washington without proper authority, violation of the sovereignty of a friendly State by arresting a deserter in Canada and bringing him away within the United States.

5. See G. O. 5, 45, 47, 63, 66, 87, 93, 102, 103, 110, of 1861; Do. 15, 33, 35, 42, 54, 66, 96, 106, 115, 117, 120, 125, 131, 136, 137, 144, 156, 161, 183, 195, 196, 197, 199, 209, 211, 215, 217, of 1862; Do. 4, 11, 12, 15, 19, 23, 27, 31, 32, 39, 44, 59, 60, 68, 75, 89, 93, 94, 115, 119, 120, 136, 180,

Special Orders, of the War Department.[1] In the great majority of cases, no trial or investigation by a military court had preceded the action taken. In a considerable number, however, there had been a previous trial, and either a dismissal had been imposed by the sentence, which, because of the disapproval of the convening authority, or of some legal defect in the proceedings, had been rendered inoperative;[2] or—as already noticed—an acquittal or a minor penalty had been adjudged, when, in the opinion of the Executive, an absolute separation from the service should have been the result.

Operation of an Order of Dismissal—*When it takes effect.* An order of dismissal can legally take effect only *upon notice;* in other words, till the party is personally and officially notified that he has been dismissed, he is not dismissed in fact or in law. Where the summary dismissal is announced in a General Order, which, when received at his post or station, is publicly promulgated to the command, the presumption will in general be that the officer became informed of the dismissal on the day of such promulgation—a presumption subject to be rebutted by proof that he was at the time absent by authority and thus could not have been notified.[3] In general, however, an officer summarily dismissed is regularly notified of his dismissal by having an official copy of the order of dismissal delivered or transmitted to him personally; the dismissal taking effect on the day of the delivery or receipt. Where indeed such a delivery or re-

183, 187, 189, 201, 209, 210, 229, 234, 261, 263, 264, 270, 299, 327, 339, 356, 377, of 1863; Do. 117, 304, of 1864; G. C. M. O. 10, 11, 28, 33, 38, 42, 43, 53, 109, 123, 144, 156, 159, 184, 267, 278, 280, 293, of 1864; Do. 61, 70, 71, 89, 123, 129, 261, 299, 349, 566, of 1865. In a few of the cases the dismissal was originally ordered by a military commander, but subsequently ratified and adopted by the President; the original action having of course no legal effect, but amounting to a recommendation merely.

1. As these orders are very numerous, and not readily accessible to students, it is not worth while to cite them. Among the discharges summarily ordered therein a considerable proportion are of volunteer officers adversely reported upon by examining boards, officers failing to appear when summoned before such boards or before investigating commissions, supernumerary officers, &c.

2. See G. O. 32, 68, 75, 93, 94, 115, 180, 183, 187, 189, 201, 209, 210, 229, 234, 261, 264, 270, 299, of 1868; G. C. M. O. 10, 11, 28, 38, 43, 53, 267, of 1864; Do. 71, 89, 261, of 1865.

3. DIGEST, 240, 350, 351. And see, similarly, as to the taking effect of a *sentence* of dismissal, Chapter XX—"Dismissal."

ceipt is rendered impracticable by some exigency of war or the service, a considerable period may elapse before the officer can be notified and the dismissal become operative. Thus if, at the date of the dismissal, or before information of the same has reached him, he has been taken prisoner, and is in the hands of the enemy, the dismissal cannot, as a general rule, take effect until, having reported, upon exchange, to his proper commander, or having otherwise been brought within the scope of the authority of the government, he becomes officially advised of the action taken: till then he is not divested of his office or its emoluments.[1]

Extent of its effect. An executive order of dismissal, being simply a divestiture of office, cannot *per se* work a disability, or deprive the officer of any right other than his right to the office as such. Thus such a dismissal, (except where Congress otherwise specifically enacts,[2]) involves no legal disability to re-enter the military service either by commission or by enlistment, or to be employed in any branch of the public service. Nor can it affect vested rights to pay, &c. Thus it has been held by the Judge Advocate General,[3] (applying to the case an opinion of Atty. Gen. Mason,[4]) that an order by which an officer was dismissed *with forfeiture of pay due*, was, as to such forfeiture, illegal and unauthorized; the officer having a vested right in all the emoluments accruing to the office, so long as he holds it and up to the day on which he ceases to hold it, which cannot be divested except by the sentence of a court-martial imposing such a forfeiture as a *punishment*. And as an attempt to do indirectly what may not be done directly, can have no legal sanction, it was further held by the same authority that a dating back of an order of dismissal to a day prior to that on which it was really issued, or a declaration in an order that the same was to take effect as of a prior day, could not operate to affect the right of the officer to pay for the period between such day and that on which the order was in fact made or he was duly notified of it.

Prohibition of Executive Dismissals in time of Peace. —Its Constitutionality. The provision of the Act of July 13,

1. DIGEST, 351, 394.
2. As it has in Sec. 1229, Rev. Sts., hereafter considered.
3. DIGEST, 240, 351–2.
4. IV Opins., 447.

1866, embraced in Sec. 1229, Rev. Sts., and in the second clause of Art. 99, is the first instance, since the organization of the government under the Constitution, in which Congress has expressly prohibited the exercise by the President of the power of removal from office. Upon a provision divesting the Executive of a function so long and largely exercised, the question naturally arises whether the same is constitutional. In considering this question, the nature and quality of the power itself, as asserted and maintained, will be clearly illustrated.

The debate of 1789. The subject is relieved of difficulty by the almost uniform concurrence of the authorities. All point to the debate in the House of Representatives of the First Congress, of May and June, 1789, as having practically settled the question both of the existence and the extent of the power.[1] This was a debate upon certain proposed Acts, 'to establish the State, War and Treasury Departments,' in each of which was introduced a provision to the effect that whenever the Head of the Department should be "*removed from office by the President*," the "Chief Clerk" in the two former cases, and the "Assistant" in the latter case, should have the charge and custody of the records, &c.

The adoption of this provision was strenuously contested; a main objection being that, inasmuch as the heads of departments were, according to the Constitution, to be *appointed* by the President, by and with the advice and consent of the Senate, the concurrence of that body—the Constitution being silent on the point—should properly also be deemed essential to their *removal;* and that therefore the power of removal could not legally be vested in the President alone. But after a protracted debate in which Mr. Madison was conspicuous in support of the Acts, as framed and passed, it was finally determined "in favor of declaring the power of removal to be in the President," and the several measures, having received the approval of President Washington, were duly enacted, *viz.* on July 27, August 7, and September 2, 1789, respectively.[2]

The argument of the affirmative of the debate was that, while the Constitution contained no express grant of the function of removal from office, or specific provision in regard to the matter,

1. See 4 Elliot's Debates, 350–404; 1 Gales' Annals, 372–383, 455–591; Benton's Debates, 86–90, 102–108; 2 Marshall's Washington, 162.
2. I Stats. at Large, 28, 49, 65.

it vested in the President the whole executive power of the Government, and that the authority to remove was intrinsically and necessarily a part of the executive power, without which it could not be fully or efficiently exercised. "I conceive," said Mr. Madison, "that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling," (as by removal from office if deemed expedient,) "those who execute the laws."[1] Fisher Ames, in combating the notion that it would be dangerous to determine that the power was vested in the President, observed:—"It will be found that the nature of the business" (of removal) "requires it to be conducted by the head of the Executive; and I believe it will be found even then that more injury will arise from not removing improper officers than from displacing good ones."[2] Mr. Boudinot expressed himself as "certain from the nature of things, that it was not the intention of the Constitution to prevent the President from removing an officer who was found to be wholly unfit or incapable of doing his duty."[3] Mr. Madison also asserted the view that—"inasmuch as the power of removal is of an executive nature, and not affected by any Constitutional exception, it is beyond the reach of the legislative body."[4]

Subsequent rulings. In the course of his remarks Mr. Madison further declared—"The decision that is at this time made will become the permanent exposition of the Constitution."[5] In point of fact the result of this debate has ever since been treated by writers on the subject as a cotemporaneous interpretation of the Constitution, not merely as to civil officers but equally as to military and naval officers, the appointment of both classes being authorized by the same constitutional provision. This exposition has been since repeatedly illustrated by the authorities. Thus in the early case in Pennsylvania of Commonwealth *v.* Bussier,[6] Tilghman C. J. refers to the question under considera-

1. 1 Gales' Annals, 463. In U. S. *v.* Guthrie, 17 Howard, 307, McLean J. observed:—"In this discussion in Congress, Mr. Madison * * considered the removal from office was an executive power, and that Congress could not restrict its exercise."

2. 1 Gales' Annals, 476.

3. Idem, 376.

4. Idem, 464.

5. Idem, 495.

6. 5 Sergt. & Rawle, 461, (1820.)

tion in the following terms:—This question "engaged the attention of the Congress of the United States soon after the formation of the Federal Constitution, by which the President nominates and appoints by and with the advice and consent of the Senate. There was some plausibility in the argument that the tenure of officers should be at the pleasure of the President and Senate, because the President could not appoint without the consent of the Senate and the Constitution is silent as to the power of removal. Yet it was determined with general approbation that the pleasure of the President was the tenure of office. A main reason for this opinion was that the President, being vested with the supreme executive power, was bound to carry the laws into operation, which can only be done through the intervention of officers. If these officers are not removable at his pleasure, he is relieved from that responsibility to which it is for the public good to hold him. An officer is not appointed for his own sake but for that of the public. If he misbehaves, the sooner he is removed the better, because the country suffers every moment that he continues in office."

In 1839, in the case of *Ex parte* Hennen,[1] the Supreme Court of the United States, in remarking that—"the Constitution is silent with respect to the power of removal from office, where the tenure is not fixed," adds—generally—that, "in the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider *the power of removal as incident to the power of appointment.*" The court then goes on to observe that "it was very early adopted as the practical construction of the Constitution," and has since "become the settled and well understood construction" of that instrument, "that the power of removal was vested in the President *alone*."

In 1842, in an opinion[2] relating to a *naval* officer who had been "stricken from the rolls" by the President, it was declared by Atty. Gen. Legaré that—"it is now too late to dispute the settled construction of 1789. It," (the authority to remove,) "is, according to that construction, from the very nature of executive power, absolute in the President, subject only to his responsibility to the country, (his constituent,) for a breach of such a vast and solemn trust." And he continues,—"it is obvious that if necessity is

1. 13 Peters, 258, 259. And see Blake *v.* U. S., 103 U. S., 231.
2. IV Opins., 1.

a sufficient ground for such a concession in regard to officers in the civil service, the argument applies *a multo fortiori* to the military and naval departments." Referring to the action taken in the case before him, he concludes—"I have no doubt, therefore, that the President had the constitutional power to do what he did."

In 1847, in the case of Surgeon Du Barry of the *army*,[1] Atty. Gen. Clifford, in commenting upon the debate of 1789, says:—"The power was finally affirmed to be in the President alone by a majority of both houses of Congress, after great deliberation and perhaps one of the ablest discussions in the history of the country. That decision was acquiesced in at the time, and has since received the sanction of every department of the government." He then goes on to show that there is no essential difference between the cases of military and those of civil officers, "much the largest class of whom," he observes, "are appointed under that clause of the Constitution from which the power of the President is derived to appoint the officers of the army and navy.[2] * * * No such distinction," he continues, "was taken in the debate on either side. On the contrary, it was maintained that the power of removal extended to every officer in the government except the judiciary. The plain inference to be drawn from the whole discussion leads irresistibly to the conclusion that the construction adopted was intended to reach every officer appointed by the President, except the judges of the federal courts."[3] He further instances the fact that—"the form of a military commission, in general use, expressly describes the tenure of office and very clearly recognizes the doctrine of 1789: '*This commission to continue in force during the pleasure of the President of the United States for the time being.*'"

1. IV Opins., 609–613.

2. And see VIII Opins., 231.

3. It is noticed in this opinion, (p. 613,) that the only writer who holds that the power of executive dismissal is limited to cases of civil officers is De Hart. [See his "Military Law," p. 228–243.] "It is sufficient," says Mr. Clifford, "to remark that the weight of authority on this point is altogether against the views of this author. The construction of 1789 is too forcibly fixed in principle and has been too long established in practice to be shaken by any elementary writer however respectable, and the attempt to limit and qualify its application to the officers in the civil service has been wholly unsuccessful." So, Mr. Cushing, (VIII Opins., 230,) refers to De Hart as not entitled to consideration upon the present subject.

In a later opinion[1] Atty. Gen. Cushing expresses himself as follows:—"I am not aware of any ground of distinction in this respect, (the liability to be deprived of their offices at the will of the President,) so far as regards the strict question of law, between officers of the army and any other officers of the government. As a general rule, with the exception of judicial officers only, they all hold their commissions by the same tenure in this respect. Reasons of a special nature may be deemed to exist why the rule should not be applied to military in the same way it is to civil officers; but the legal applicability to both classes of officers is, it is conceived, *the settled construction of the Constitution.* It is no answer to this doctrine to say that officers of the army are subject to be deprived of their commissions by the decision of a court-martial. So are civil officers by impeachment. The difference between the two cases is in the form and mode of trial, not in the principle, which leaves unimpaired, in both cases alike, the whole constitutional power of the President." And, with reference to the case submitted to him, he adds:—"I am therefore of opinion that the President had the constitutional power to remove Mr. Lansing," (a military storekeeper,) "from office."

The same Atty. Gen., in a subsequent opinion,[2] incidentally observes, speaking of the President—"The power of removal, and the absolute right to exercise it according to his conscience, like the power of appointment, he holds by the Constitution."

In a third opinion,[3] Mr. Cushing reviews at length the subject under consideration, as illustrated by the authorities; shows that, in regard to civil officers, the construction of the Constitution is "*fixed, as all admit, past change;*"[4] and, holding that no differ-

1. VI Opins., 5–6.
2. VII Opins., 251.
3. VIII Opins., 230–232.
4. Mr. Cushing here adds :—"I say *past change*, for the result of the earnest discussion of the question in the Twenty-third Congress, when the subject was revived for the very purpose, would appear to be decisive on that point." It was in this Congress that Mr. Clay offered, to a pending bill for restricting the executive patronage, an amendment declaring that, in cases of officers appointed by the President by and with the advice and consent of the Senate, the power of removal should be exercised only in concurrence with the Senate. This proposition was supported in an elaborate speech, but the amendment was subsequently withdrawn and was not renewed. See Gales and Seaton's Cong. Deb.,

ence exists in the application of the power to military or naval officers, concludes—generally—that "the power to remove is inherent in the executive power to nominate, as conferred on the President by the Constitution."

More recently—since the late war—Atty. Gen. Browning, in an opinion[1] in the case of an army officer who had been summarily dismissed by the President, notwithstanding an acquittal by court-martial, observes:—"The authority of the President to dismiss an officer from the military or naval service has been fully and elaborately considered by several Attorneys General. They have, in every instance where the question arose, asserted that the authority was derived from the Constitution, and that its exercise was sanctioned by the settled construction of that instrument and the uniform practice of the executive branch of the government." He then reviews some of the rulings of his predecessors, and, referring to the Act of July 17, 1862, by which the President is "authorized and requested to dismiss and discharge" officers of the army and navy, for cause,—comments thereon as follows:—"This provision did not, in my opinion, clothe the President with a new power, but gave an express legislative sanction to the exercise of a power incident to the high official trust confided to him."[2]

The leading commentators on the Constitution have expressed themselves to the same general effect in regard to the debate of 1789 and its result. Thus Sergeant writes[3]—"It was determined by Congress that the power of removal belonged to the President by virtue of the clause in the Constitution vesting in him the executive power, and other parts of that instrument, and this construction has since prevailed."

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vol. XI, part I, pp. 455, 513–524; 2 Mallory's Life and Speeches of Clay, 244; 2 Colton's Speeches of Clay, 11–12.

1. XII Opins., 424–426.

2. That this provision of 1862 was "simply declaratory of the long established law," see XV Opins. At. Gen., 421; also Blake *v.* U. S., 103 U. S. 234.

As to *other* "declaratory provisions which neither enlarge nor diminish the constitutional power of the President"—see VIII Opins., 233.

With the opinions of Attys. Gen., cited in the text, see II Opins., 67, and XII Id., 4, where the general power to dismiss is recognized by Mr. Wirt and Mr. Stanbery. The power was repeatedly affirmed by Judge Advocate General Holt, in his opinions during the war.

3. Const. Law, 373.

A similar view is expressed by Sto
tion of 1789, and Kent refers to it
"This amounted to a legislative cons
and it has ever since been acquiesce
decisive authority in the case. It ap
officer of government appointed by
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Conclusion. It will appear fror
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President this power'—was founded
cal history of the enactment of 1866,—

1. 2 Com. on Const. § 1537, note.

2. 1 Com., 310. And see Rawle on
Washington, 162.

3. It was carried in the House of Repr
against twenty, but in the Senate only
President. The Federalist opposed it—
views of Story in 2 Com. § 1539.

4. 17 Howard, 288.

as a check upon President Johnson by a Congress toward which he occupied an antagonistic position,—is still remembered.[1] In the light of this history, while the existing law is of course binding till repealed or authoritatively determined to be unconstitutional, it is rather to be respected as an expression of the sentiment of Congress that dismissals, without trial, of army and navy officers, are in general inexpedient in time of peace, than as an exercise of the legislative power "to make rules for the government and regulation of the land forces." And, in this connection, it may be noted that now, as at the date of the opinion of Atty. Gen. Clifford above cited, it is still declared in the commissions of military officers, as issued from the War Department, that the same are "*to continue in force during the pleasure of the President of the United States.*"

Effect of the ruling in Blake's case. Until recently it had been generally supposed that the legislation of 1866, (admitting its constitutionality,) operated absolutely to prohibit the removal from office, in time of peace, of an officer of the army, (not subject to retirement as presently to be noted,) by any form of proceeding except the sentence of a court-martial. In 1880, however, in the case of a chaplain of the army,[2] it was held by the Supreme Court that the statute of 1866, in declaring in substance that the President should not summarily dismiss officers, meant simply that "he alone" should not exercise this power; there being, as it was considered, in this legislation "no intention to deny or restrict the power of the President, *by and with the advice and consent of the Senate*, to displace them" (*i. e.* officers of the army and navy) "by the appointment of others in their places." It was therefore specifically held that—"The President has the power to supersede or remove an officer of the army or the navy,

1. See Blake *v.* U. S., 103 U. S. 235–236. In this connection should be noticed the "Tenure of office Act" of March 2, 1867, (the provisions of which, as amended by the Act of April 5, 1869, are incorporated in Secs. 1767 *et seq.* of the Rev. Sts.,) by which the concurrence of the Senate is made necessary to the absolute removal of *civil* officers. This measure also was adopted during the same period of political excitement—when the President and Congress were at variance—as was the Act referred to in the text, and, as to the question of its constitutionality, is subject to a similar criticism. See the reference to it by Atty. Gen. Evarts, in Rollins' case, XII Opins. 445–6, 449.

2. Blake *v.* U. S., 103 U. S. 231.

by the appointment, by and with th
Senate, of his successor."[1] Under t
determining to remove an officer of
after a trial which has not resulted
nominate to the office an eligible p
if the Senate concur in the nominatic
bent is completed.

**Sec. 1229, Rev. Sts.—Dismissa
tion.** The provision in the last cla
ing the President to drop from the r
officers who have been absent witho
an incorporation into the Revised S
of s. 17, Act of July 15, 1870, c. 294
to the forfeiture of pay by the offic
in the subsequent Sec. 1266.

The dropping from the rolls here
summary dismissal, is distinguished
already considered as consisting in l
This latter is a constitutional functi
a special power conferred by Congre
ing the army of a useless member
abandoned it, and the treasury from
services no longer rendered: further,
ineligible for reappointment, Congr
disqualification not involved in the
under the general constitutional aut

This distinction has been illustrat
Advocate General,[3] followed by a co
case,) of the Attorney General,[4] to t
has been dropped from the rolls ur
to apply for a trial under Sec. 123

1. And see McElrath *v.* U. S., 102 U.
S. 336. Cooley, Prins. Const. Law, 437.

2. This is the only *general* statute on
lution of Congress, of May 5, 1870, ha
drop from the rolls two particular officer
1868, Congress had itself dropped six l
sence from duty.

3. DIGEST, 243.

4. Opin., At. Gen., of Feb. 16, 1881.
the Court of Claims—Newton *v.* U. S., 1

the latter section applying only to cases of officers summarily dismissed under the general power of removal of the Executive.

Under this statute there had been dropped, up to July, 1885, only *fifteen* officers.

Secs. 1245 and 1252, Rev. Sts.—Dismissal by "Wholly Retiring." These Sections, (taken from s. 17 of the Act of Aug. 3, 1861, c. 42,) are introduced under this Title as exhibiting a special authority vested in the President to summarily dismiss officers, found to be incapacitated for active duty by causes not incidental to the military service, by what is called "wholly" retiring—an awkward term, since all retired officers are wholly retired, but meaning here dropping altogether from the army; the names of the parties being, as is provided in the latter section, thenceforth "omitted from the Army Register."[1]

The authority here conferred might with reason be regarded as having been divested in 1866 by the operation of the Act of July 13 of that year, heretofore considered, by which the President was prohibited from dismissing officers in time of peace. In practice, however, the Act of 1866 was not treated as having such effect, cases of officers removed by being "wholly retired" being published in nearly all the Army Registers between 1866 and 1874, when the provision of 1861 was re-enacted in the Revised Statutes. Forming now a portion of the same general Act as does the provision, (of Sec. 1229 and Art. 99,) containing such prohibition, and not being repugnant thereto, it is (like the enactment relating to the dropping of officers for desertion,) to be regarded as of equal force with that provision, to the general rule indeed established by which it may, (also like the said enactment,) be viewed as constituting a special exception.[2]

Sec. 1230, Rev. Sts.—Trial for Officers summarily dismissed. This provision, which is s. 12 of the Act of March 3, 1865, c. 79, has already been fully considered in Chapter VI. It provides for persons removed by executive act from military office[3] a formal hearing, and a remedy in case injustice is found

1. Officers wholly retired become at once civilians, and, as such, cannot be readmitted to the army except by a new appointment. DIGEST, 433; Miller *v.* U. S., 19 Ct. Cl. 339; McBlair *v.* U. S., Id. 528.

2. See DIGEST, 432.

3. That it does not apply to cases of officers dropped for desertion

to have been done them. Under existing law, however,—in view of the prohibition of such dismissals in time of peace,—this enactment is operative only in time of war.

Sec. 1228, Rev. Sts.—Restoration of Dismissed Officers. This section, which, as illustrating the effect of the dismissal of an officer of the army, is in a measure a complement of Art. 99, is the Act of Congress of July 20, 1868, c. 185, not substantially modified.

Cases of Dismissal by Sentence. This Act was described in its title as "declaratory" of the existing law in regard to officers dismissed by court-martial. That it was declaratory *in fact* of the law as it had existed from the beginning of the government under the Constitution, is indicated by the uniform rulings of the Attorneys General prior to its date. These rulings are to the effect that the only legal mode of restoring to office in the army one who has been duly dismissed therefrom by the sentence of a military court, is by the exercise of the appointing power of the Executive. This, for the reason that the dismissal separates the officer fully and finally from the military service and makes him a private citizen, and that no such citizen can be endowed with a military office except in the way pointed out in the Constitution, *viz.* upon a nomination to the Senate confirmed by that body.[1]

Opinions of Attorneys General, &c. Of the rulings referred to, on this subject, some of the principal will be cited—as follows:

Thus, in an opinion given in 1843, in the cases of two naval

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under Sec. 1229, R. S.,—see DIGEST, 243; Opin., At. Gen., of Feb. 16, 1881.

1. That the concurrence of the Senate is requisite may be stated as a general principle almost without qualification, since the exceptions thereto are so few. The Constitution, however, provides that Congress *may*, by statute, "vest the appointment of inferior officers"—a term understood to include army officers in general: see X Opins. At. Gen., 450—"in the President alone, in the courts of law, or in the heads of departments;" and in rare cases Congress has been held to have vested *in the President alone* the power to appoint officers of the army. See X Opins., 450; also opinion of Judge Advocate General, (in DIGEST, 106–7,) sustained by the Court of Claims in Collins *v.* U. S., 14 Ct. Cl. 568, the ruling in which was affirmed in the Same Case in 15 Id., 22.

officers, Lieut. Whitney and Passed Midshipman Moorhead,[1] who had been dismissed by sentence, Atty. Gen. Nelson, in referring, first, to the judgment pronounced in the former case, as harsh, proceeds as follows:—"But I know of no revisory power by which that sentence can now be rescinded, annulled, or modified. It has been passed upon by the competent authority from whose decision the law has provided no appeal. It must, therefore, forever stand as the judgment of the court. The effect of the judgment, it is true, may be removed; not, however, in virtue of any authority to reverse the court's sentence, but in the exercise of the power of appointment with which the Constitution has clothed the President. No case has been brought to my notice in which an officer once dismissed has ever been restored to the service otherwise than by nomination by the Chief Magistrate and confirmation by the Senate, where the grade of the appointment was within the control of their joint action; and if such a case has occurred, I should not hesitate to declare it to be in direct repugnance to the Constitution and the laws, and to every principle applicable to their just and safe construction."

As to the case of the other officer named, this—the Attorney General remarks—"stands precisely, as far as the law is concerned, upon the same footing. The facts disclosed by the record show it to be one in which the sentence pronounced and executed was peculiarly harsh and severe. The proceedings of the court held in his case I do not deem it necessary particularly to discuss. I have no difficulty, however, in stating that they were exceedingly irregular. Testimony, manifestly illegal, was admitted, whilst that which was legal was ruled to be inadmissible. But still I do not perceive how those irregularities can be regarded as annulling the judgment pronounced.[2] They might have been appealed to as reasons why the revisory power, when called to act upon the proceedings, should not have approved the finding and sentence of the court; but that approval having been signified, they cannot avail wholly to avoid everything that has been

1. IV Opins., 274. It need hardly be remarked that the same rule must necessarily apply to all commissioned officers whether of the navy, army, or marine corps.

2. That mere irregularities in the record, not affecting the legal validity of the proceedings, cannot authorize the setting aside of the sentence—see further, IV Opins. At. Gen., 170; VII Id., 104; X Id., 65, 67; XIV Id., 449.

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1. IV Opins., 306.
2. Id., 318.
3. VI Id., 370.
4. VI Opins., 514. And see X Id., 66
5. VI Opins., 507.

sentence of a court pronounced in a case within its jurisdiction, duly approved by the revising power, and actually carried into full and complete execution."

In a subsequent opinion—in the case of Capt. Downing of the navy[1]—the same Atty. Gen. describes the effect of a sentence of dismissal, duly confirmed and executed, in the following terms:—"The dismissal thus became a consummated fact, and incapable of being recalled by the President, so that, if" this officer "were to be restored to the navy, it could only be done by a new appointment. In this condition of things, and in the present stage of the case, no question can be raised on the proceedings of the court, save the purely technical one of nullity of sentence for want of jurisdiction."

More recently,[2] Atty. Gen. Williams, referring to an army officer who had been cashiered by sentence, says of him that he "is out of the army as much as if he had never been in it." And in a later case[3] he more fully delineates the status of a duly dismissed officer of the army, as follows:—"His previous connection with the service having ceased, he thereupon became a civilian, and in a legal point of view he can be regarded as standing on no different ground relatively to an appointment to such rank or position than that occupied by any civilian who may never have been in the army. If it would be contrary to the law of the military service to appoint the one thereto, so it would be to appoint the other."

As a further reference—Atty. Gen. Evarts[4] clearly states the law in regard to an officer of the army dismissed by sentence, in remarking that, after such sentence "is duly confirmed and exe-

1. VII Id., 99.
2. XIV Opins., 449.
3. Id., 502.
4. XII Opins., 548. The same doctrine has recently been repeated by Atty. Gen. Brewster, in Gen. Porter's case, (Opin. of Mch. 15, 1882,) where indeed, in stating that the particular officer, having become, by dismissal, a civilian, can be restored to the army only by a reappointment, he adds that such reappointment must be authorized by special Act of Congress because the Army Regulations require that "*appointments to the rank of General shall be made by selection from the army.*" [In a further opinion in this case, of June 23, 1884, it was held by the same authority that an Act of Congress requiring or authorizing the appointment to a military office of a *particular person designated by name* was unconstitutional, mainly as assuming to limit and control the appointing power of the President.]

cuted, the dismissed officer cannot be reinstated by means of a pardon or in any other manner than by a new appointment and confirmation by the Senate. This is because the execution of the judgment in effect abrogates the officer's commission and entirely dissolves his connection with the service, placing him in exactly the same situation relatively thereto which he occupied previous to his original appointment."[1]

Conclusiveness of approved sentence of dismissal. The extracts thus given illustrate most fully the principle of the conclusiveness of a legal sentence of dismissal adjudged by a military court, when the same has been once duly passed upon by the final authority provided by the code and thereupon executed.[2] In such an instance the law, having in view the imperative necessity for certain and speedy punishment in the military service, has provided no appeal from the decision and order of the final reviewing officer, (whether President, or—in time of war—military commander,) who, as it is expressed by Mr. Cushing, is thus the "ultimate judge" in the case.[3] The sentence of dismissal being once approved and executed—and we have heretofore seen that it becomes executed upon *notice* to the officer of the act of approval or confirmation, officially given—the absolute separation of the party from the military service is a *fait accompli*. The President's, (or military commander's,) authority over the sentence or proceedings of the court, as the final reviewing officer and judge designated by the code, is exhausted, and he is without the power to recall or modify his action. Moreover, as a pardon cannot affect an executed punishment, the President, as the pardoning power under the Constitution, cannot any more do away with the effect of the sentence than he could in the other capacity

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1. To the same effect see the recent case of Vanderslice *v.* U. S., 19 Ct. Cl. 480; Runkle *v.* U. S., Id. 397.

2. In some of the opinions cited, the fact that the dismissal was executed under a *former* President is referred to as illustrating the absence of authority in the existing Executive to reopen the case. See IV Opins., 170; V Id., 384; VI Id., 507, 514; X Id., 65. This fact, however, cannot affect the question of the legal power. See XI Opins., 22. A sentence of dismissal is as fully executed, and as completely beyond the reach of the reviewing authority or the pardoning power, on the day after that on which it takes effect, as at any subsequent time, however long, thereafter.

3. And see XI Opins., 21.

devolved upon him by the 106th Article. This has already been pointed out in the extract from the opinion of Mr. Evarts, and is illustrated by the Supreme Court in *Ex parte* Garland,[1] where it is said—"A pardon does not restore an office forfeited." Thus the party sentenced is placed in precisely the position of any other civilian who has never been in the army at all. Except in the mode provided by Art. II, Sec. 2, § 2 of the Constitution, he cannot be reinstated in or restored to the Army.[2]

Illegal restorations, &c., by orders. Such being the law on this subject, the appropriateness of the title of the Act of 1868, in describing it as a statute *declaratory of the existing law*, is clearly perceived. That this legislation was, further, most timely—was in fact needed—is shown by the practice which had grown up in the latter part of the war of making an executive order do the duty of a constitutional appointment, and thus of ignoring the principles of law governing the filling of offices in the army as well as those determining the effect of the judgments of courts-martial.

The extent to which this practice had been carried can only by appreciated by consulting the published General Orders[3] of the War Department, especially during the years 1865 to 1867 inclusive. Here will be found order after order in which the *legal* and *executed* sentences of military tribunals were assumed to be set aside, and the officers, duly dismissed thereby, to be thereupon restored to, or redetached honorably from, the army. In some of these cases the officer, (who upon the execution of his sentence had become a civillian,) is "reinstated in," or "restored" or "returned to" his former office and rank;[4] in others he is "honorably discharged" from, or "mustered out" of, the military service;[5] in others his resignation is accepted, (or per-

1. 4 Wallace, 381. And see Vanderslice *v.* U. S., 19 Ct. Cl. 480.

2. See, further, in this connection, Report 868 of the Judiciary Committee of the Senate, of March 3, 1879, 45th Cong., 3d Sess.; Digest, 237–8, 390–1.

3. A large number is also to be found in the Special Orders.

4. See G. O. 81, 116, of 1863; G. C. M. O. 378, 540, 550, 630, 675, of 1865; Do. 9, 160, 171, 201, 206, of 1866; Do. 75, 81, 90, 97, 105, of 1867; Do. 46 of 1868; Do. 19 of 1870.

5. See G. C. M. O. 559 of 1865; Do. 3, 21, 64, 65, 80, 81, 93, 99, 122, 133, 161, 172, 180, 205, 207, 221, of 1866; Do. 17, 20, 86, 88, 89, of 1867; Do. 2, 78, of 1868; Do. 44 of 1869.

mitted to be tendered,) as of the date generally of the preceding dismissal.[1] In the majority of these Orders the sentence is declared to be "revoked;" in others it is "set aside" or "annulled." In one it is "vacated," in another "voided," in others "modified"—to honorable discharge. In several the sentence, once duly approved by a competent commander, (and executed,) is again reviewed and "disapproved;" in some the pardoning power is applied, and the executed sentence "remitted" or the individual "pardoned."

It need hardly be observed that the action in *all these cases* proceeded upon a misconception of law and of the executive function, and was wholly without legal authority. Those Orders which, in assuming to "revoke" or "set aside" a regular and valid sentence, declared the party to be "honorably discharged" or "mustered out," or announced that his resignation was accepted, were equally illegal with those which professed to reinstate him as an officer, since to discharge or muster out as an officer one who is a civilian, or to permit him to resign as such, it is necessary first to put him back into the army.

Restorations, &c., by legislation. It is thus perceived that the statute of 1868, in recalling the military department of the government within its proper province, and in reaffirming the rule of law governing cases of the class under consideration, was a judicious and opportune measure. Upon its enactment, the practice above indicated was presently discontinued, and the more recent cases of a disregard of the organic law in the particular under consideration are not cases of executive orders but of statutory enactments by Congress. Thus, by an Act of March 3, 1873, c. 250, the Secretary of War was "authorized and directed to restore" a party named,—who, as a captain in the veteran reserve corps, had been dismissed by sentence in March, 1865, (since which time that corps had ceased to exist,)—"to his position as such captain, and grant him an honorable muster-out as of the date on which he was dismissed." Again, by an Act of June 9, 1874, c. 273, the Secretary of War was "authorized and directed to give to" a party, who, as a captain of a regular regiment, had been dismissed by sentence in June, 1870, "an honorable dis-

1. G. O. 27 of 1865; G. C. M. O. 271, 629, of 1865; Do. 16, 225, of 1866; Do. 26, of 1867.

charge from the service of the United States, to date" as of the date of his dismissal. Still further, by an Act of June 23, 1874, c. 499, it was provided—"That the Secretary of War be and is hereby directed to amend the record of," (a lieutenant named who had been dismissed by court-martial in July, 1870,) "so that he shall appear on the rolls and records of the army for rank as if he had been continuously in service."

These provisions were all at variance with the provisions of the Constitution relating to appointments.[1] Congress has no power, of itself, to restore to the Army a legally dismissed officer, or—since, to do so, it must first restore him to it—to grant him an honorable discharge from it. Nor has it any authority to empower the President or Secretary of War to do either,—except indeed, in so far as it may authorize a restoration by a new *appointment* under Art. II of the Constitution. As to the Act last above cited, of 1874, it is to be remarked that the same was held by the Attorney General to have been wholly inoperative, at least for the purpose for which it was apparently designed.[2] "The Act in question," he observes, "seems to proceed upon the idea that the obliteration of the Army records, as therein provided for, will *ipso facto* restore" the party "to the office from which he was dismisssd. This idea is in conflict with the Constitution of the United States." The party, "in pursuance of the sentence of a duly organized court-martial, was discharged from the Army in 1870, and since that time his relations to it have been like those of any other private citizen. Any mistake by this tribunal, not involving its jurisdiction, does not affect the validity of its proceedings. Congress cannot annihilate a fact by causing the record-evidence of its existence to be destroyed; nor can Congress constitutionally appoint a private citizen a lieutenant, colonel, or general in the Army. The appointing power is vested by the Constitution 'in the President, by and with the advice and consent of the Senate,' except where it is vested by law in the courts or the heads of Departments."[3]

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1. See on the subject of this class of legislation—DIGEST, 341–344; also recent case of Wood *v.* U. S., 15 Ct. Cl. 151, in which the principle that appointments to office cannot be made by Congressional enactment is illustrated in the case of an army officer.

2. XIV Opins., 448. The effect which *is* given to the Act in the opinion is certainly a remarkable instance of a liberal construction.

3. A more recent instance of exceptional and objectionable legislation

Restoration of Officers dismissed by Order. In connection with the specific subject of the Section under consideration—the restoration of officers dismissed by *sentence*—it may well be noticed that the same constitutional principle and the same rule of law apply equally and alike to cases of officers dismissed or separated from the military service in any other legal and authorized manner.

Rulings on the subject. Thus, an officer dismissed by *summary order* of the President, (at a time when that form of removal from office had not been prohibited by statute,) was as fully and completely made a civilian as where dismissed by sentence, and could not therefore be restored by a new order revoking the original order, but by a reappointment alone. This also has been uniformly held by the Attys. Gen., who have also noticed that the justice or injustice of the dismissal was an immaterial circumstance. Thus in the case of Surgeon Du Barry of the navy,[1] dismissed by executive order without trial, it was observed by Atty. Gen. Legaré, as follows:—"He was clearly out of the service by a lawful and valid, however harsh, (and even it may be unfair,) exercise of the appointing power. If he has been restored, it has not been by avoiding the act dismissing him, for that could not be done. It was beyond the power of the Executive. All that the President can do, in such cases, is to repair any wrong done by a new appointment." And, in a further opinion in the same case,[2] another Atty. Gen., Mr. Clifford, says:—"No process of reasoning or fiction of law will enable his

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of this class was the Act of March 15, 1878, by which the President was authorized to "annul and set aside the findings and sentence" of a general court-martial by which an officer had been legally dismissed from the military service, and to "place him on the retired list of the army." A later and even more extraordinary instance was that of the Joint Resolution of March 3, 1879, by which the Secretary of War was "required to order a military court-martial or court of inquiry to inquire into the matter of the dismissal" of a certain officer named; "said court to be fully empowered to confirm or annul the action of the War Department by which said" officer was "summarily dismissed the service" in 1863; the "findings" of the court "to have the effect of restoring" said officer "to his rank, with the promotion to which he would be entitled if it be found that he was wrongfully dismissed, or to confirm his dismissal if it be otherwise found"!

1. IV Opins. 124. And see the general observations applicable to either form of dismissal, already cited from XIV Id., 502.

2. IV Opins., 604.

counsel to escape from the fact that, during all this time," (the period during which the order of dismissal was in operation,) he was a private citizen holding no commission under the authority of the United States." In a later opinion,[1] Mr. Cushing places the two forms of dismissal upon the same footing as respects the power of the Executive to rehabilitate or relieve the officer; and in a more recent case,[2] of an officer of the army dismissed by order and subsequently sought to be restored by a second order assuming to revoke the former, Mr. Browning, citing as authority Atty. Gen. Nelson's opinion, already quoted, in the case of the two naval officers dismissed by *sentence*, holds that the relations of an officer to the service being "dissolved" by an executive order of dismissal, "a revocation of the order dismissing him cannot work his restoration;" in other words, that the order of so-called revocation is a simple nullity and wholly futile, revoking nothing.

The only counter authority known to exist on this point is that of the Court of Claims in the early case of Smith *v.* United States,[3] in which it was held that where an executive order was issued revoking a previous summary order of dismissal in the same case, the prior order "was revoked from its inception and altogether;" that "all its consequences were annulled;" and that the officer was to be viewed as having been in office continuously during the entire interval between the date of the order of dismissal and that of the revocation, and entitled to full pay for such period. This eccentric doctrine, however, though repeated in some other of the earlier cases passed upon in that court,[4] was finally abandoned by the same in McElrath's case,[5] and the correct doctrine as there held has been reaffirmed in later rulings.[6]

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1. VIII Opins., 235.

2. XII Id., 427. And see DIGEST, 241, 390–1. It follows that any Orders of the War Department, in which valid summary dismissals have been revoked, were, so far, unauthorized and legally inoperative. See cases in G. C. M. O. 637 of 1865; Do. 76 of 1866.

3. 2 Ct. Cl. 206. The fact, to which importance was attached in this case,—that the original order was unjust and that the revoking order was made to right the wrong done,—was really wholly immaterial.

4. Winters *v.* U. S., 3 Ct. Cl. 136; Barnes *v.* U. S., 4 Ct. Cl. 216; Montgomery *v.* U. S., 5 Ct. Cl. 93.

5. McElrath *v.* U. S., 12 Ct. Cl. 202; affirmed in 102 U. S. 426.

6. Balen *v.* U. S., 19 Ct. Cl. 389; Montgomery *v.* U. S., Id. 370; Miller *v.* U. S., Id. 338; U. S. *v.* Corson, 114 U. S. 619.

Cases of officers otherwise separated from the army. The principle thus illustrated is the same, and the same rule is to be applied, where, in any legally authorized mode or form *other than* by summary order of dismissal, the officer is separated from the military service. As, for instance, where he is discharged by the Executive, not as an original act, but under and by reason of a public statute expressly requiring such discharge.[1] So, where he is "dropped" under Sec. 1229, or "wholly retired"[2] under Sec. 1252, of the Revised Statutes, already considered. And so, where the officer has tendered his resignation and the same has been duly accepted: here also it has been held by Atty. Gen. Evarts,[3] that, upon such acceptance, the officer is "out of the service as completely as if he had never been in it," and "that he can only be restored to it by a new appointment made conformably to the Constitution;" further, that an order assuming to revoke an acceptance of a resignation, after the same had once taken effect, is of no legal validity.

Result. The result of this general examination of the subject is, that in all cases where an officer of the army is legally separated from the military service, and remanded, as he must thereupon at once be, to the status of a civilian,—whether this be effected by sentence of general court-martial, summary order, dropping, retiring, acceptance of resignation, or otherwise,—the mode pointed out in Section 1228 of the Revised Statutes, and in Art. II, Sec. 2 § 2, of the Constitution, is the only legal mode by which he can be restored to the army; that any other mode, whether resorted to by the executive or legislative department of the government, is in derogation of the Constitution and wholly futile;[4] that it in no manner affects the application of the general principle that the dismissal may have been quite unwarranted by the facts or grossly unjust; and that the only exception to such

1. See V Opins., 101; also VIII Id., 223.

2. See the principle applied to a case of a "wholly retired" officer in McBlair *v.* U. S., 19 Ct. Cl. 528; also in Miller *v.* U. S., Id. 338.

3. Capt. Mimmack's case, XII Opins., 555; Do. XIV Id., 262. See also this case reported in 10 Ct. Cl. 584, where a similar result is reached upon quaint reasoning, and in 97 U. S. 426, where the previous rulings are affirmed. These rulings have been still later reaffirmed in the case of Bennett *v.* U. S., 19 Ct. Cl. 379. And see XIV Opins., 499.

4. See—generally—the Opinions of the At. Gen. in Gen. Porter's Case, of March 15, 1882, and June 23, 1884.

application is where the original dismissal was absolutely illegal and therefore inoperative—as where, the dismissal having been by sentence, the proceedings of the court, from defect of constitution, want of jurisdiction, or otherwise, were rendered null and void. Such case, however, is really no exception, since here there has been no dismissal in law.

XXIX. THE ONE HUNDRED AND TWENTY-SECOND, ONE HUNDRED AND TWENTY-THIRD, AND ONE HUNDRED AND TWENTY-FOURTH ARTICLES.

[RELATIVE RIGHT OF COMMAND, RELATIVE RANK, &C., OF DIFFERENT CLASSES OF OFFICERS.]

"ART. 122. *If, upon marches, guards, or in quarters, different corps of the Army happen to join or do duty together, the officer highest in rank of the line of the Army, Marine Corps, or militia, by commission, there on duty or in quarters, shall command the whole, and give orders for what is needful to the service, unless otherwise specially directed by the President, according to the nature of the case.*

"ART 123. *In all matters relating to the rank, duties, and rights of officers, the same rules and regulations shall apply to officers of the Regular Army and to volunteers commissioned in, or mustered into said service, under the laws of the United States, for a limited period.*

"ART. 124. *Officers of the militia of the several States, when called into the service of the United States, shall on all detachments, courts-martial, and other duty wherein they may be employed in conjunction with the regular or volunteer forces of the United States, take rank next after all officers of the like grade in said regular or volunteer forces, notwithstanding the commissions of such militia officers may be older than the commissions of the said officers of the regular or volunteer forces of the United States.*"

ONE HUNDRED AND TWENTY-SECOND ARTICLE.

Origin. The original of this provision, as taken from a corresponding British Article, is found in Art. 25, Sec. XIII, of the

code of 1776. It first appears, however, in its present form, in the 62d Article of 1806.

Construction—*"If upon marches, guards, or in quarters."* This somewhat antiquated form of expression, which might well be dropped altogether from the Article, or be replaced by some simpler and more comprehensive term, is no doubt intended to cover all occasions of duty where different corps of the military force would be likely to meet for joint service, whether upon a campaign against an enemy, or when quartered together at a garrison or military post in time of peace.

"Different corps of the Army." As in Art. 82, heretofore considered, the term "corps" is regarded as used here in a general sense, as extending to any separate and distinct arm or branch of the service comprised in the existing military establishment. The description "different corps of the army" is therefore construed as embracing, on the one hand, the infantry, cavalry, and artillery, and, on the other hand, the various departments, &c., or individual officers, included under the general term *staff*—a term which will be more particularly defined hereafter.

Further, the word "corps," as here employed, is interpreted as meaning not only an organized body or complete portion of the force, but any officered detachment however small or even single officer, representing such an organization or portion.[1] It has already been noticed[2] that the term "different corps" in Art. 82 is held to allow of the same application.

"Happen to join or do duty together." This phrase is evidently intended to comprehend not only occasions where different corps are employed together upon some specific duty under express orders, but where, by the chances of an engagement, a march, or other incident of the service, such corps come to meet and combine in any military operation or movement, or in the occupation of the same camp, garrison, or post. A mere fortuitous and temporary meeting, where the two or more separate bodies or detachments do not in fact combine, and where no oc-

1. See Circ. 3, Dept. of Va. & No. Ca., 1865.
2. Chapter XXII—"Construction of Art. 82."

casion arises for the assumption of a single command over the whole, is of course not contemplated.

"The officer highest in rank by commission shall command the whole," &c. This means the officer who is highest or senior in rank by the commission under which he is at the time serving.[1] He may possess a commission in a higher rank than that in which he is actually serving, but it will not be available for conferring command under the circumstances contemplated by the Article. Thus a captain may also be a colonel by brevet, but unless he has been specially assigned to duty according to his brevet rank,[2] and is serving at the time under that assignment, he cannot claim any right of command pertaining to such rank.

The provision of the Article is also operative where the original commander of the mixed command absents himself or is disabled by wounds or illness. In such case the Article devolves the command upon the next senior line officer present, as his successor.[3]

"Of the line of the Army." The term "line of the Army" is susceptible of being interpreted as intending Regulars or U. S. forces as distinguished from State or other local troops; an officer of the line of the army thus being one who holds his commission under the authority of the United States as distinguished from one who holds it by the appointment of a Governor or other local authority. This interpretation receives support from the fact that during the Revolutionary war the term *line* was frequently employed in the laws and proceedings of Congress to indicate the military contingent of a particular State—as the "Pennsylvania line," the "New Jersey line," the "Virginia line,"[4] while in referring to the regular army, or the army as a whole, the term "line of the army" or "continental line" was sometimes used.[5]

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1. See O'Brien, 51, 55.

2. Under Sec. 1211, Rev. Sts., as now restricted by Act of March 3, 1883, providing that officers shall be so assigned "only when actually engaged in hostilities."

3. See G. O. 14, Dept. of the Ohio, 1865.

4. The "Virginia line" is also referred to in the later Acts of Aug. 10, 1790, and June 9, 1794.

5. See III Jour. Cong., 132, 572, 705, where this line and the line or lines of a State or States, are directly contrasted.

In support of this ruling it is declared in the Order that the term *line* is employed almost uniformly elsewhere in the public laws as "correlative and contradistinctive" to *staff*. A case referred to, (as occurring in the same statute,) is that of Art. 74 of 1806, in which the phrase—"in the line or staff of the Army," is used as a comprehensive description of the military establishment in general. Other cases are cited from a series of Acts between 1813 and 1847. It is however to *prior* Acts—*i. e.* to legislation had by Congress between the adoption of the Constitution in 1789 and the enactment of the code of 1806—that reference should especially be had in this connection, and such legislation is in fact found to present repeated instances in which the term "line of the Army" is employed to designate the line as distinguished from the staff.[1]

The Line and Staff Officers of the Present Establishment, distinguished. The *line* officers proper of the army as now organized comprise all the officers—colonels, lieutenant colonels, majors, captains and lieutenants—of the existing five regiments of artillery, ten regiments of cavalry, and twenty-five regiments of infantry; *line* being thus substantially equivalent to *regimental*. These officers, however, are line officers, in the sense of the Article, only when acting or serving as such: a line officer detailed upon staff duty ceases for the time to be a part of the line.

The *other* officers of the establishment,—with the exception of a single class yet to be specified,—are those designated as *staff* officers; this description comprising—(1) the officers of the "*gen-*

British Army from other corps." And see Burns' Mil. and Naval Technological Dict.—"Ligne." Duane, (an American writer,) who follows James, says in his Mil. Dict.—"The marines, militia, and volunteers do not come under the term." The present prevailing and familiar construction, however, of the term *line* is as given in the text.

1. See Acts of March 3, 1791, s. 5; March 5, 1792, s. 7; May 30, 1796, s. 3, 12, 13; March 3, 1797, s. 2; May 28, 1798, s. 6; July 11, 1798, s. 2; July 16, 1798, s. 3, 4; March 16, 1802, s. 3, 4; February 28, 1803, s. 2. And see also earlier instances in 3 Jour. Cong., 273; 4 Id., 165.

It may be noted here that the word "line" was sometimes employed in the early statutes in another and more specific sense, to indicate a separate and distinct arm or portion of the forces. Thus—"the line of major generals," (3 Jour. Cong., 202;)—"the line of infantry in the army of the United States," (Id., 560;)—"the line of artillerists and engineers," (Act of July 16, 1798, s. 9;)—"the lines of artillerists, light artillery, dragoons, riflemen and infantry, respectively," (Act of June 26, 1812, s. 5.)

eral staff," *i. e.* the staff of the President as Commander-in-chief,[1] consisting of the heads and members of the different staff "corps" or "departments" serving in the War Department at Washington or at the headquarters of military Divisions or Departments, or other stations; (2) the officers of the *personal* staffs of commanding generals, consisting of the aids, (and military secretary of the Lieut. General,) allowed by statute.

Line and General Officers distinguished. The excepted class above indicated are the *general officers* of the army, (other than those at the head of the staff corps,) now consisting of one Lieutenant General, three Major Generals, and six Brigadier Generals. These officers, commanding as they do both staff and line, and charged as they are with duties and responsibilities incident to a supervision of both staff and line service, are themselves clearly no more line than staff officers,[2] and are therefore not included in the description "of the line of the Army" employed in the Article. Command, however, being of the very essence of their rank and office, a construction of the Article which would exclude them from command, under the circumstances therein specified, would involve an absurdity. No such construction, however, is required, for the reason that this is evidently a class of officers *not contemplated by the Article at all*, but quite outside of and beyond its application. It thus follows that their right of command, upon occasions of the coöperating of bodies of troops, is in no manner affected by the Article, but is to be determined, in the absence of any special assignment, (*i. e.* "unless otherwise specially directed by the President,") by the established military rule of superior rank and seniority. In other words, as remarked by the Secretary of War, in the Order above cited,[3] the Article was designed to meet only cases where, upon the uniting of different corps, there is present "*no common*

1. Stocqueler, (Mil. Encyc.,) defines "Staff," (*i. e.* what is known with us as the "General Staff,") as—"the body of officers intrusted with the general duties of the army in aid of a Commander-in-chief." And see DIGEST, 276–7.

2. In a few of the early statutes—(see Acts of March 5, 1792, s. 7; March 3, 1795, s. 10)—fixing the pay of the army, the officers are classed under the two heads of "General Staff" and "Regimental;" the *general* officers being named under the former. This classification, however, subsisted for but a brief period.

3. G. O. 51 of 1851.

superior" of the line officers commanding the several detachments. If indeed, he adds, "there be a Major General or Brigadier General present, the case contemplated by the Article does not exist: no question can arise as to the right of command, because the general officer, not belonging to any particular corps, takes the command by virtue of the general rule which assigns the command to the officer highest in rank."

Assimilated Cases—Marine Corps or Militia. By the terms of the Article, line officers of the Marine Corps, when "detached for service with the Army," as indicated in Art. 78, and line officers of Militia, when mobilized and serving with it under a call by the President, are assimilated to officers of the army proper, so far as respects the right of command.

But here it is to be observed that the provision as to militia officers is to be taken as subject to the provision of Art. 124,—that when such officers are "employed in conjunction with the regular or volunteer forces of the United States," they shall "take rank next after all officers of the like grade in said forces," notwithstanding that their commissions may be older than those of the officers referred to. Thus a captain of regulars or volunteers would be entitled to the command in preference to a captain of militia with whom he was joined in service, though the commission of the latter bore an earlier date: a captain of militia, however, would of course take precedence of and command a lieutenant of regulars or volunteers under the same circumstances. The two Articles—the 122d and the 124th—are, as they stand, somewhat contradictory, but, being parts of the same statute, it is necessary to give that force to the provisions of each which they would have if they constituted but one section in which the second appeared in the form of a proviso to the first.

ONE HUNDRED AND TWENTY-THIRD ARTICLE.

Origin. This statute, which first appears as an Article of war in the existing revised code of 1874, is a concise form of a provision of sec. 2 of the Act of March 2, 1867, c. 159; which section, omitting the last clause, (which provides that the Act shall not apply to the militia,) enacted as follows:—"*That in all matters relating to pay, allowances, rank, duties, privileges, and rights of officers and soldiers of the army of the United States, the same*

rules and regulations shall apply without distinction for such time as they may be or have been in the service, alike to those who belong permanently to that service and to those who, as volunteers, may be or have been commissioned or mustered into the military service under the laws of the United States for a limited period."

That portion of this section which refers to the "pay and allowances of officers and soldiers" is incorporated in Sec. 1292, Rev. Sts.[1]

Effect and Spirit. This Article, recognizing the principle that officers and soldiers of *volunteers* in the U. S. service are a constituent part of the Army which Congress is authorized by the Constitution to raise and support, and that, except as to their term of service, no legal distinction exists between them and the officers and soldiers commonly designated as "regulars," places specifically the officers of both contingents upon precisely the same footing as to precedence, command, and all other rights and duties attached or pertaining to rank or office.[2] The term "rules and regulations" is viewed as employed in the statute in a general sense, and as intended to embrace all laws, army regulations and orders by which the rights and privileges of the members of the military establishment are defined and fixed.

A tribute to the volunteers. The statute of 1867, as now represented by this Article and by Sec. 1292, Rev. Sts., is really a tribute to the services of the volunteer forces during the late war. Prior to this legislation, a discrimination, as to rank and precedence, in favor of regular officers over officers commissioned by State authority, which had been initiated by the Resolution of Congress of Nov. 4, 1775,[3] and Art. 2 of Sec. XVII of the code

1. In XV Opins., 332–3, the Attorney General, in referring to the original provision of 1867 as having "undergone very material modification in the revision of the Statutes," observes that "part of it appears in Sec. 1292, R. S.," and "part of it also in the 123d Article."

2. It may be remarked here that par. 11 of the Army Regulations, in so far as it relates to volunteer officers, whether commissioned by Governors of States or by the President, is in contravention of this Article, and therefore without legal effect.

3. This is in full as follows:—"*Resolved*, That the officers on the continental establishment shall, when acting in conjunction with officers of equal rank on the provincial establishment, take command of the latter and also of the militia; and the officers of the troops on the provincial establishment shall, when acting in conjunction with the officers of the

of 1776, had been continued in Art. 98 of the code of 1806 which remained in force pending the war. But during this exigency, from the first *levée en masse* to the end of the rebellion in 1866, the volunteer element of the national army had become so vastly augmented as not only greatly to exceed all others but finally, so far as the enlisted men were concerned, to comprise practically the efficient fighting force.[1] The public services of this class of troops had been in proportion to their numbers. Without them the rebellion could never have been suppressed or the sovereignty of the United States re-established. At the same time the *militia* proper, though valuable as far as they went, and especially at the outset of the war, had been shown to be a far less considerable and available element of our military strength. Hence the justice, at the termination of hostilities, of placing upon the statute book an enactment testifying to the worth and importance of the volunteer forces by putting an end to the previous discriminations against them and assimilating them in every respect, while remaining in the Army, to the most favored class of the military,[2] and, further, by providing that at any future period of war or public danger, when their employment should be authorized by Congress, they should enter and remain in the Army on the same footing and with the same rights as the permanent establishment.

Application of the Article. It is manifest from its terms, and has indeed been specifically so held by the Judge Advocate General[3] and the Attorney General,[4] that the Article is operative only at a period when regular and volunteer officers are serving

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militia, take command and precedence of the latter of equal rank, notwithstanding prior dates of commissions."

1. Gen. R. B. Ayres, who commanded a large portion of the regular force in the late war, testified on the Warren Court of Inquiry, with reference to the state of his command at the date of the battle of Five Forks, fought at the end of the war, on April 1, 1865, as follows:—"Q. Had you any of the regulars of your division here? A. No; the regulars had been buried. I had regulars—what were known as the regular division, before I went into the battle of Gettysburg. I left one half of them there, and buried the rest in the Wilderness. There were no regulars left."

2. And see Art. 124, where regular and volunteer officers are assimilated in their relations to *militia* officers.

3. DIGEST, 410.

4. XV Opins., 333.

together in the army as "distinctive classes of commissioned officers." The Article has therefore no *present* application; and now that all claims of officers of the army to pay, rank, &c., by virtue of their volunteer service, are practically settled, the principal significance of the statute is that which attaches to its history.

ONE HUNDRED AND TWENTY-FOURTH ARTICLE.

Origin and Effect. The origin of this provision is to be found in the Resolution of Congress of Nov. 4, 1775, cited under the last Article, and in Art. 2, Sec. XVII of 1776, re-enacted in Art. 98 of 1806. Its effect is to subordinate militia officers, as to precedence, relative rank, and relative right of command, to officers both of regulars and volunteers, on all occasions of their serving jointly with the latter. As contained in the present Article, this provision is but a reiteration of the law which, existing from the initiation of the Government, has classed the militia as the inferior element of the available military strength of the nation.[1]

Determination of Relative Rank under the foregoing Articles. Questions of relative rank arising under the three preceding Articles can—it may be remarked—be determined by military superiors, courts-martial, courts of inquiry, &c., only by a reference to the Army Register, or—where the rank is not stated or does not fully appear therein—to the date of the commission or appointment under which the officer is at the time serving. Claims for higher relative rank, or for priority in rank, not assigned to them by the Register, have not unfrequently been raised by officers, (especially of the staff corps,) and in some instances with good reason and justice. Such claims have in certain cases been adjusted by the Secretary of War, (after a reference sometimes to Boards of Officers for report and opinion;) but, commonly, involving, as their settlement must in general do, questions as to vested rights of others than the claimants, the latter have been referred to Congress for the relief sought. That such claims cannot be adjudicated by military courts or commanders

1. As already indicated, the Act of March 2, 1867, c. 159, s. 2, in assimilating volunteers to regulars, as to their rights and privileges, takes care by an express proviso to exclude the *militia* from any such relation.

is quite clear. For this reason, and because the same are usually determined not by fixed principles but by the facts and circumstances of each particular instance, this class of questions will not here be discussed.

XXX. THE ONE HUNDRED AND TWENTY-FIFTH, ONE HUNDRED AND TWENTY-SIXTH, AND ONE HUNDRED AND TWENTY-SEVENTH ARTICLES.

[DISPOSITION OF EFFECTS OF DECEASED OFFICERS AND SOLDIERS.]

"ART. 125. *In case of the death of any officer, the major of his regiment, or the officer doing the major's duty, or the second officer in command at any post or garrison, as the case may be, shall immediately secure all his effects then in camp or quarters, and shall make, and transmit to the office of the Department of War, an inventory thereof.*

"ART. 126. *In case of the death of any soldier, the commanding officer of his troop, battery, or company shall immediately secure all his effects then in camp or quarters, and shall, in the presence of two other officers, make an inventory thereof, which he shall transmit to the office of the Department of War.*

"ART. 127. *Officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased officers or soldiers. And no officer so charged shall be permitted to quit the regiment or post until he has deposited in the hands of the commanding officer all the effects of such deceased officers or soldiers not so accounted for and delivered.*"

These Articles will be considered together.

Original and Other Provisions. The substance of these Articles is traced by Samuel[1] to the ordinances of the Tudors and Stuarts.[2] He notes the fact that at an early period *courts-martial*

1. Pages 656, 657. And see Clode, 1 M. F., 213.

2. See Art. 59 of the Code of James II, in Appendix. Similar provisions were also contained in the Articles of the Earl of Essex, of 1642, and those of Charles II, of 1666.

were invested with a peculiar probate jurisdiction in the matter of the administration of the estates of military persons,[1]—a jurisdiction of which a vestige is perceived in the requirement of our own original Articles on the subject, that the inventory of a deceased officer's effects should be made "before the next regimental court-martial."

In the existing British law, the specific provisions from which ours were taken have some time disappeared from the military code, having been superseded by a separate Act of Parliament, *viz.* the 26th and 27th Vict., c. 57, of July 21, 1863, known as the "Regimental Debts Act," in aid of which separate Regulations were issued by the Crown on April 22, 1881.[2]

In our law, the matter of the disposition of the effects of deceased military persons formed the subject of Arts. 68 and 69 of 1775, Arts. 1 and 2 of Sec. XV of 1776, and Arts. 94 and 95 of 1806.

The Articles under consideration are supplemented by regulations contained in Arts. XIV and XXIII of the Army Regulations.

Application of the Articles. These articles, doubtless enacted with a view mainly to instances of officers or soldiers dying either in active service in war, or at remote posts or strictly military stations,[3] were apparently intended to apply to cases of officers of *regiments* and soldiers of organized *companies.* By a liberal construction, however, they are operative in cases of any other officers serving, at their decease, in the field or with a "post or garrison" command. So where soldiers who die when similarly serving are not members of a company, it will be within the spirit of Art. 126 for the commanding officer, whether or not a company commander, to proceed as therein specified.

It need not affect the substantial application of the Articles that the officer or soldier deceases when temporarily *absent* from his regiment, company, &c. Such cases appear to be contemplated by pars. 118 and 228 of the Army Regulations.

The cases to which the Articles are least adapted to apply are such as those of officers or soldiers of staff corps, or aids of gen-

1. O'Brien, (p. 157,) repeats Samuel.

2. The Act and Regulations are to be found in the Manual, pp. 633-652.

3. See DIGEST, 100.

erals, serving at Washington, at Division or Department headquarters, or at stations which are not military posts, and officers or soldiers on the retired list. In such and similar instances, the estate, real and personal, of the deceased, while, if necessary, it may properly be placed in temporary charge of an officer of the command, will, regularly, presently be disposed of according to the laws of the State, Territory, or District, in which the party deceased or resided, or in which the property may be situate or held.

The Duties Enjoined. These consist in the securing of the effects, the making and transmitting of an inventory, the taking care of the property, and the accounting for and delivery of the same to the proper legal representative. A further duty is devolved upon the officer in charge of the effects, to turn them over, in the event of his absenting himself from the command, to the commanding officer.

Securing the effects. The term "secure" properly means to collect and take into safe possession. The officer designated for the duty will thus take charge forthwith of such articles of property as were in the personal possession of the officer or soldier at his decease, as also of such as, being in the possession of others, are voluntarily surrendered, or may be reached by means of an order requiring their delivery or if necessary by the use of military force. He may also, as is remarked by O'Brien,[1] receive money *voluntarily paid* in satisfaction or partial satisfaction of debts due the deceased. But the officer is merely performing a military duty; *he is in no sense an administrator.* He has therefore no authority to institute an action at law for the recovery of a debt due the estate or property withheld therefrom:[2] should he assume such a responsibility, he might render himself personally liable for the amount involved, in whole or in part, as an "executor *de son tort*"[3]—a result which the Articles clearly could not have contemplated.

The effects indeed which are required to be secured are such

1. Page 157.

2. See Samuel, 659; O'Brien, 157.

3. An executor *de son tort*, (or *of his own wrong*,) is one who, by intermeddling without legal authority with the estate, subjects himself to the liability of a regular legal representative. See DIGEST, 100.

as are "then in camp or quarters." As to the meaning of these words, as employed in the corresponding British Articles, Hough[1] cites an opinion, given in 1819, by the law officers of the Crown, to the effect that the term refers only to movables or money actually found in quarters, "and not to effects, debts, or money in the hands of third persons." The officer will thus fully perform his strict duty under the Articles if he simply "secure" the immediate tangible personal effects of the deceased.[2]

Making and transmitting the inventory. The inventory is of course a detailed list of the specific effects of the deceased—clothing, furniture, valuable papers, jewelry, arms, animals and all other articles of personal property left by him in camp or quarters at his death. It should be subscribed by the officer making it, in his official capacity; and, in compliance with the direction of Art. 126, the inventory of the effects of an *enlisted man* should be made and executed "in the presence of two other officers," who also will properly affix their names to the paper as witnesses.

Directions as to the making up and forwarding of inventories are contained in pars. 119, 226 and 227 of the Army Regulations.

Taking care of the property. "Care" means properly the safe custody and preservation of the articles as secured. The officer, not being an administrator, is not authorized to pay, out of the effects, any debts of the deceased, or even the expenses, (if such are incurred,) of his funeral:[3] if he does so, he subjects himself to a personal liability for the pecuniary amount thus diverted.[4] The question of the authority to *sell* property in any case will be referred to under the next head. The period during which the *care* of the specific effects is in general to be exercised

1. Page 556.

2. As to the proceedings on the death of an officer charged with *public* property or money, see par. 121, Army Regulations.

3. As to the defraying of such expenses, see pars. 122, 123, Army Regs.

4. "It would be at the private responsibility of the officer, if he further intermeddled with the estate of the deceased than he is of necessity authorized by the Articles, in the particulars ordained." Samuel, 659. In Memo., Dept. of the Columbia, March 23, 1873, Gen. Canby observes that the officer in charge, being "a *quasi* administrator, may properly make such expenditures as may be necessary to prevent waste or loss until the effects are taken charge of by the family, or a legal administrator is appointed." But, as we have seen, the officer is in fact not an

is limited by the Regulations[1] to "two months" in the case of an officer, and to "a short period after his decease" in the case of an enlisted man.

Accounting. Art. 127 enjoins that "officers charged with the care of the effects of deceased officers or soldiers shall account for and deliver the same, or the proceeds thereof, to the legal representatives of such deceased." The legal representative of a deceased officer or soldier is the executor, if any, nominated by him in his will,[2] or—where there is no will, or no such nomination—the administrator appointed by the proper judge of probate, surrogate, or other authorized official. The representative must of course have been duly qualified, and the officer will not ordinarily be justified in surrendering the property to a person assuming to be the legal representative of the deceased, except upon his exhibiting formal letters testamentary granted to him by competent authority.

The words "or the proceeds thereof," which do not appear in the earlier forms of the Article, are deemed to have reference primarily to the proceeds of the sales, directed or authorized by pars. 120 and 229 of the Regulations to be resorted to after a certain interval provided that legal representatives do not meanwhile appear. Otherwise, *i. e.* pending such interval, a sale should not be made except in an extreme instance. Where indeed, on account of some military movement or other emergency, the property, or any part of it, cannot be removed or longer cared for, or where it is perishable in its nature and cannot be kept without serious damage, the Article may be regarded as authorizing its sale and conversion into money in the interest of those entitled. The officer in charge, however, should not in general resort to a sale, other than as indicated in the Regulations, without the approval of the proper commander.

In duly turning over the specific effects or their proceeds to the administrator or executor, the military agent is discharged of his responsibility.[3] He will properly of course take formal receipts in full for the articles or moneys delivered.[4]

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administrator nor assimilated to one, and he could not in general therefore make such expenditures except at his own risk.

1. Pars. 120, 229.
2. As to the effect of testacy—see *post.*
3. DIGEST, 100.
4. See par. 231, Army Regs.

The Effect of Testacy. It may be observed in conclusion that the mere fact that the deceased officer or soldier has left a *will*, is not, (as has already been indicated,) to be regarded as dispensing with the proceedings prescribed by the Articles. Even if the will be only a *nuncupative* one,[1] a legal representative must in general be appointed and qualified before the estate can be disposed of or distributed. If indeed the deceased has bequeathed his property, (being of material value,) to a comrade or friends in the same command, and such command is so situated that the legatee or some other person present may, with but slight delay, obtain from proper authority the right to administer, it may perhaps be superfluous to resort to the precautions pointed out in the Articles. But even in such a case it will be rare that the

1. A "nuncupative" will, (from the Latin *nuncupare*, to name or pronounce orally, or without writing,) is an oral declaration of a bequest of his personal property, made *in extremis*, in the presence of witnesses or a witness, by an officer or soldier in actual military service, or by a mariner at sea. [In some States it is specially authorized to be made by other persons on occasions of mortal illness.] Nuncupative wills, which are said to have been first permitted by Julius Cæsar to his Roman soldiers, were, at an early period, adopted from the civil by the common law, and have been generally recognized and sanctioned by modern statute. The term—"in actual military service," commonly employed in the statutes on the subject, has been construed to mean on some duty associated with positive danger, as at a battle, or during a hostile movement or expedition in time of war. The fact appearing that the declaration was made upon an occasion of this character, and also that the party, being conscious and in sound mind, made it as his will, or with the *animus testandi*, and in expectation of death,—the formalities usually required for the authentication of written wills are dispensed with in the proof of the nuncupative will. The same is therefore established simply by the testimony of the person or persons present who heard the words of direction and can faithfully repeat them or their substance. There need have been but a single witness, and he need not have been specially requested to act as such by the testator. But, as it is observed by Blackstone, the act of nuncupation "must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses." For particulars of the history and law of nuncupative wills, see Redfield on the Law of Wills, c. VI, s. II.; 1 Jarman on Wills, 130–1; 2 Black. Com., 500–1; Swinburne on Wills, part I § XIV. Prendergast, 227–231; Clode, 1 M. F., 212; Hubbard *v.* Hubbard, 4 Seld. 196; *Ex parte* Thompson, 4 Bradf. 154; Prince *v.* Hazelton, 20 Johns. 501; Dockum *v.* Robinson, 6 Fost. 372; Gould *v.* Safford's Estate, 39 Vt. 498. It may be added that the policy of the law which sustains nuncupative wills will also often sustain *written* wills, executed by officers or soldiers and seamen under the circumstances above indicated, but without the formalities prescribed by statute—as, for example, wills not attested by the requisite number of witnesses. [See the above authorities.]

local law will allow so speedy an issue of letters testamentary as to do away with the necessity of securing the effects in the manner indicated by the military code.

XXXI. THE ONE HUNDRED AND TWENTY-EIGHTH ARTICLE.

[READING AND OBSERVANCE OF THE ARTICLES OF WAR.]

"ART. 128. *The foregoing articles shall be read and published, once in every six months, to every garrison, regiment, troop, or company in the service of the United States, and shall be duly observed and obeyed by all officers and soldiers in said service.*"

Previous Forms. Art. 101 of 1806 was substantially identical with the present form of this provision. A previous Article—No. 1 of Sec. XVIII of 1776—was to a similar effect, except that the reading was required to be done "once in every two months." A like requirement was contained in the corresponding British Article of 1765. It was required in the Code of Gustavus Adolphus that the articles "be read every month publicly before every regiment, to the end that no man shall pretend ignorance."

Effect. This Article, which is a complement of the provision of Art. 2, requiring that the Articles "shall be read to every enlisted man at the time of, or within six days after, his enlistment," enjoins a further reading at fixed intervals as a regular ceremonial of the service. It is clear that where the reading is not thus reiterated, the ordinary soldier can hardly be expected to remain familiar with all the requirements of the code.[1] In some instances during the late war, where the reading had been neglected in a command, it was ordered that the Articles, or at least the principal ones, be read oftener than here prescribed, viz. once a week,[2] or—in one case[3]—twice a week. Sentences

1. G. O. 20, Dept. of the Mo., 1861.

2. G. O. 12, Army of the Potomac, 1861. Do. 41, Dept. of the Ohio, 1866.

3. G. O. 26, Dept. of the South, 1864. In this Order it was added—"one reading to be on Sunday, and, where practicable, by the chaplain."

of soldiers tried by court-martial have not unfrequently been mitigated for the reason that the accused had not been sufficiently made acquainted with the Articles;[1] and the failure properly to read them on the part of commanders has been denounced as a military offence.[2] Certainly if the *reading* is not performed according to the first part of the Article, the *observance* of and *obedience* to the code required by the concluding clause can scarcely be fully ensured.

It may be added that where there are men in a command who are but imperfectly acquainted with the English language, a complete compliance with the injunction of this Article will require that the Articles be not only read to them but, where necessary, specifically explained.

XXXII. CONCLUDING PROVISION—SEC. 1343, REV. STS.

[TRIAL AND PUNISHMENT OF SPIES.]

"SEC. 1343. *All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.*"

Earlier Forms. Our military codes prior to that of 1806 contained no provision for the punishment of spies, nor was any contained in the British code from which our earliest Articles were derived. The first legislation in this country on the subject was the Resolution of the Continental Congress, of Aug. 21, 1776, as follows:—"*Resolved, That all persons, not members of, nor owing allegiance to, any of the United States of America, * * * who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death, according to the law and usage of nations, by*

1. G. O. 31, Dept. of the East, 1868; G. C. M. O. 73, Id., 1872; Do. 25, Dept. of Texas, 1874. And see G. O. 23, Army of Occupation, W. Va., 1861; Do. 49, Dept. of the Susquehanna, 1864.

2. G. O. 14, Dept. of the Ohio, 1865.

sentence of a court-martial, or such other punishment as such court-martial shall direct."[1] This was the law in force during the Revolutionary war, and at the time of the trials of Major Andre, Lieut. Palmer and others.

The next specific enactment,[2] that of 1806, formed the concluding provision of the code of Articles of war of April 10 of that year, being in fact sec. 2 of the same Act of Congress. It provided:—"*That in time of war all persons not citizens of or owing allegiance to the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death according to the law and usage of nations, by sentence of a general court-martial.*"

This statute, except in so far as to confine the trial of spies to *general* courts and to make the death penalty obligatory in all cases of conviction, did not materially modify the original form. Citizens—as noticed in the case of Smith *v.* Shaw in 1814[3] remained still unamenable for the crime of the spy.

The law continued without change till the period of the late rebellion, when the Article of 1806, being inadequate to the conditions of the exigency, was amended by the Act of Feb. 13, 1862, c. 25, s. 4, so as to read as follows:—"*That in time of war or rebellion against the supreme authority of the United States all persons who shall be found lurking as spies or acting as such in or about the fortifications, encampments, posts, quarters or head quarters of the armies of the United States or any of them within any part of the United States which has been or may be declared to be in a state of insurrection by proclamation of the President of the United States, shall suffer death by sentence of a general court-martial.*"

By this provision the [illegible] offence was extended [illegible]

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1. [illegible] lution be printed [illegible]

2. Meanwhile a [illegible] "inhabitant of these [illegible] aid the enemy [illegible] death [illegible] 2 Jour. Long. [illegible] employed [illegible]

3. [illegible] Louailler [illegible] gan. [illegible]

States; the general term "all persons" being now evidently left unqualified for the purpose mainly of embracing the class which would naturally furnish the greatest number of offenders, *viz.* officers and soldiers of the confederate army and civilians in sympathy therewith.

The jurisdiction indeed was confined to offences committed in parts of the United States declared to be in insurrection.[1] This restriction, however, was soon done away with, and the jurisdiction made general—*i. e.* applicable to offences committed anywhere in the United States, or in another country during a foreign war—by the Act of March 3, 1863, c. 75, s. 38. This enactment, (which made the crime cognizable also by military commission,) was expressed in the form and terms retained in the existing law—Sec. 1343, Rev. Sts., above cited. While the provision of 1863 did not expressly refer to that of 1862, as amended or repealed, it clearly entirely superseded it.

Definition of Spy—Nature and Proof of the Offence. A spy is a person who, without authority and secretly, collects material information within the lines of one of the hostile armies, with the design of imparting it to the other.[2] The information is commonly such as relates to the numbers or resources of the enemy, the state of his defences, the positions of his forces, their proposed movements or operations, and the like. The *clandestine* character of his proceedings and the deception thus practised constitute the gist or rather aggravation of the offence of the spy.[3] The statute refers to him as "lurking;" and Halleck describes him as "*insinuating himself* among the enemy." The concealment is in general contrived by his disguising himself by a change of dress,[4] by coloring the hair,[5] removing the beard or

1. See case, in G. O. 39, Dept. of the Mo., 1863, of an alleged spy, whose offence was committed in Missouri prior to the date of the statute next to be mentioned, and in which it was properly held that the court-martial ordered for the trial had no jurisdiction of the offender.

2. Halleck, Int. Law., 460; Lieber, Instructions, G. O. 100 of 1863, § 88; Manual of Mil. Law, 270; G. O. 13, Dept. of the Mo., 1861; Do. 30, Id., 1863; Do. 23, Dept. of Kans., 1864. The information must be intended for the enemy, not for the personal uses of the party himself.

3. Authorities cited in last note; also DIGEST, 455; G. O. 174 of 1862; Do. 74, Dept. of the Ohio, 1863.

4. In a case in G. O. 92, Dept. of the Ohio, 1864, a female spy, when arrested, was disguised as a man.

5. See case in DIGEST, 456.

rearing a false one, assuming a false name,[1] &c.; as also by false epresentations, by personating another individual, or by any other alse pretence or form of fraud. During the recent war the maority of the persons tried and convicted as spies were officers or oldiers of the enemy's army, who, in penetrating our lines, had bandoned their proper uniform for the dress of a civilian;[2] and : was held that such an officer or soldier, discovered thus disuised, was in general to be treated, not as a prisoner of war, but s being *prima facie* a spy.[3] This presumption, however, might— t was ruled[4]—be rebutted by evidence that the party had come rithin the lines for a comparatively innocent purpose—as to visit is family; or, having been detained within the lines by being eparated from his regiment, &c., on a retreat, had changed his ress merely to facilitate a return to the other side.[5] In such a ase indeed the clearest proof would properly be required before ccepting the defence.

But to be charged with the offence of the spy, it is not essential iat the accused be a member of the army or resident of the ountry of the enemy: he may be a citizen or even a soldier of he nation or people against whom he offends, and, at the time f his offence, legally within their lines.[6]

Beside the coming within the hostile lines without authority, eing in disguise, making false representations, &c., a most sigificant circumstance going to fix upon the suspected person the *animus* of the spy is the destruction or attempted destruction by im, upon being detected, of letters, dispatches, or other writings

1. See cases in G. C. M. O. 215 of 1864; G. O. 24, Dept. of the East, 865, (case of Kennedy;) Do. 92, Dept. of the Ohio, 1864; DIGEST, 456; so André's case, Printed Trial, Philad., 1780; 2 Chandler Crim. Trials, 57.

2. See cases in G. O. 267, 269, of 1863; Do. 5, 41, of 1864; G. C. M.). 93, 152, 248, of 1864; G. O. 57, Middle Dept., 1863; Do. 3, Dept. f the Ohio, 1864; Do. 14, Dept. of the East, 1865, (case of Beall;) DIEST, 455. So, Major André was disguised in a suit of clothes belongig to Joshua Hett Smith. 2 Chandler, C. T., 185.

3. See Lieber § 83; DIGEST, 455; G. O. 30, Dept. of the Mo., 1863;)o. 21, Middle Dept., 1863; Do. 23, Dept., of Va. & No. Ca., 1863;)o. 74, Dept. of the Ohio, 1863; Do. 10, Dept. of the Tenn., 1863; Do. 3, Dept. of Kans., 1864.

4. DIGEST, 455, 456. And see G. C. M. O. 110 of 1864.

5. See case in G. O. 59, Dept. of the Susquehanna, 1864.

6. See case in G. O. 26, Dept. of Va. & No. Ca., 1864, of a soldier of ie *federal army* convicted as a spy.

in his possession, containing information for the enemy.[1] Another suspicious circumstance is an attempt to *bribe* the arresting party to allow him to proceed.[2]

But to prove him to be a spy, it is not necessary that the accused should be shown to have communicated, or even to have obtained, the desired information, or any information whatever.[3] The fact that he was "lurking" or "acting" *with intent* to obtain material information, to be communicated by himself or another to the enemy, is all that is required to complete the offence.[4]

Further, it is not necessary that the spy should be within the lines without authority.[5] One who, being legally admitted under a *flag of truce*, abuses his privilege by secretly collecting facts for the use of the enemy, renders himself liable to the punishment of the spy.[6] Such was the situation in the case of André, who, moreover, held a *passport* from Arnold. But this could not protect him from being treated as a spy, since, having been given by one who was in criminal complicity with him, it was null and void as a safe-conduct.[7]

It need scarcely be added that the mere observing of the enemy, with a view to gain intelligence of his movements, does not constitute the offence in question, for this may be done, and in active service is constantly done, as a legitimate act of war. As remarked in the Manual—"An officer in uniform, however nearly he approaches to the enemy, or however closely he observes his motions, is not a spy, and if taken must be treated as a prisoner of war."[8] Observing the enemy from a *balloon* is no more criminal than any other form of reconnoissance.

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1. Case in DIGEST, 456.
2. This was a feature in the case of André.
3. Lieber § 88.
4. See the definitions above cited; also case in G. O. 92, Dept. of the Ohio, 1864.
5. See G. O. 346 of 1863.
6. Lieber § 114.
7. See Halleck, 408. A false passport given for the purpose of concealing the identity of the party was a feature in the case of Kennedy. G. O. 24, Dept. of the East, 1865.
8. Page 270. So Halleck, (p. 406,)—"The term *spy* is frequently applied to persons sent to reconnoitre an enemy's position, his forces, defences, &c., but not in disguise or under false pretences. Such, however, are not *spies* in the sense in which that term is used in military and international law."

The nature of the crime of the spy may be further illustrated indicating certain classes who, though guilty of a violation the laws of war, are not chargeable as spies. Thus one who sses the lines without authority as a mere *letter carrier* is not py;[1] nor is one who merely violates the rule of non-intercourse trading with the enemy, or who simply gives intelligence to e enemy in violation of Art. 46. And so one who comes se-etly within the lines with a view to the destruction of property, lling of persons, robbery, and the like, is not *as such* a spy.[2] urther, a person who passes through the lines as a *bearer of dis-tches* from one post or force of the enemy to another,[3] is *as such* t to be treated as a spy but to be held as a prisoner of war.[4]

Jurisdiction. Under the law of nations and of war, the of-ice of the spy is an exclusively military one, cognizable only military tribunals.[5] In our law, as we have seen, an express tute has, since August, 1776, made this crime triable by court-rtial, and since March, 1863, jurisdiction of the same has been ren also to the military commission, a species of tribunal to be nsidered in PART II of this treatise.

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1. See cases in G. O. 39 of 1864, of persons erroneously charged as es, who were simply arrested in our lines with letters from persons in ginia, &c., to persons in Baltimore and elsewhere. Persons arrested rying letters *to* enemies, however, would not be liable to be charged spies, if they were letter-carriers merely.

2. In the leading cases of Beall and Kennedy, though the accused were rged and convicted, *inter alia*, as *spies*, their offences were rather or inly those of "prowlers," (Lieber § 84,) or guerillas; the crimes of all consisting mostly in seizing and destroying steamers and their car-es on Lake Erie, and attempting to throw passenger trains off the track the State of New York, in September and December, 1864; and the ncipal crime of Kennedy being his taking part in the attempt to burn City of New York by setting fire to Barnum's Museum and ten hotels the night of Nov. 25th, 1864. (G. O. 14, 24, Dept. of the East, 1865; nted Trials, New York, 1865.)

3. See Lieber § 99. It was held in the late war that carrying com-nications between the confederate government in Richmond and its ents *in Canada*, did not entitle the party to be treated as a legitimate rer of dispatches. DIGEST, 456.

4. See cases of persons charged as spies, but held not shown to be h and therefore entitled to be treated as prisoners of war—in G. O. of 1862; Do. 228, 243, 346, of 1863; Do. 7, Army of the Potomac, 64. Spies, of course, are not exchanged as prisoners of war. Lieber 03.

5. Smith *v.* Shaw, 12 Johns. 257; In the matter of Martin, 45 Barb. ; do., 31 How. Pr. 228.

It has always been legal, however, and would still be so in time of war notwithstanding the statute, to proceed *summarily without trial* against spies; and in some of our earlier cases—that of André, for example[1]—the investigation was had, not by a court-martial, but by a court of inquiry or board ordered for the purpose, upon whose report, if to the effect that the accused was found to be a spy, the death penalty was presently executed.[2]

Special principles. A military court, in passing upon a case of an alleged spy, is to be governed by the rules and principles established by the usages of war as recognized in the law of nations. Beside the rules of evidence already indicated, there remain to be noticed two jurisdictional principles peculiarly applicable to cases of spies, to wit:—

1. A spy, to be triable and punishable as such, must be taken *in flagrante delicto*, or rather before he succeeds in getting through the lines and returning to the territory or army of his own nation or people. If he thus makes good his return without being arrested, the jurisdiction for his offence does not attach but lapses, and if, subsequently to such return, he is taken prisoner in battle or otherwise captured, he is not liable to trial or punishment for the original offence.[3]

2. Further, a spy, to be punished as such, must be brought to trial, (or at least must be duly arrested with a view to trial,[4]) during the existence, *i. e.* before the end of, the war.[5] Thus, in Martin's case, above cited, it was held that as the alleged offender had not been arrested as a spy till after the surrender of the confederate armies and the termination of hostilities,[6] he was not

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1. So, in the case of Thomas Shanks, G. O. Army Headquarters, June 3, 1878.

2. As to André's case, see Chapter XXIV—"COURTS OF INQUIRY."

3. Lieber § 104; In the matter of Martin, *ante;* DIGEST, 456; G. O. 24, Dept. of the East, 1865. (Kennedy's case.) In the last case the point is properly taken that for an alleged confederate spy to have escaped, without arrest, into Canada, (where there were agents of his government,) was not such a *return* as to have discharged him from liability to trial and punishment for his offence.

4. As to the principle of the attaching of jurisdiction upon an arrest with a view and for the purpose of trial—see Chapter VIII; DIGEST, 210.

5. In the matter of Martin, *ante;* Wells, Jur. of Courts, 577.

6. This was the view of the court at the time. As a matter of fact, the war, at the date of Martin's arrest, (December, 1865,) had not yet

subject to trial by a military tribunal; and he was accordingly discharged on *habeas corpus* from the custody of the military authorities. But, as will be noticed in a subsequent part of this treatise,[1] this second principle is not peculiar to the case of the spy alone, but applies to all cases of persons offending in time of war against the laws of war.

Punishment. By the law of nations the crime of the spy is punishable with death,[2] and by our statute this penalty is made mandatory upon conviction. Such penalty may be executed either by shooting or hanging. The sentence 'to be shot' was in a few instances imposed during the late war;[3] but, in the great majority of cases, the form of death by hanging, as the more ignominious and severe,[4] was adjudged. In some instances, women, (who, by reason of the natural subtlety of their sex, were especially qualified for the *rôle* of the spy,) were sentenced to be hung as spies, though in their case this punishment was rarely if ever enforced.[5] In a considerable proportion of the other cases the capital punishment adjudged was executed, and commonly on the next day or within a brief period after the approval of the proceedings.[6]

It may be observed, however, that the extreme penalty is not attached to the crime of the spy, because of the intrinsic unlaw-

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ended—according to the subsequent rulings of the Supreme Court, heretofore cited.

1. PART II—"Jurisdiction of Military Commissions."

2. Vattel, book III, p. 179; Manual, 270; Halleck, 406, 407; Lieber § 88; Smith *v.* Shaw, *ante;* In the matter of Martin, *ante;* G. O. 13, Dept. of the Mo., 1861; Do. 23, Dept. of Kans., 1864.

3. G. O. 174 of 1862; Do. 346 of 1863; Do. 39, Dept. of the Mo., 1863; Do. 4, Dept. of Ky., 1865.

4. See Halleck, 407; G. O. 107, Dept. of the Mo., 1863.

See cases in G. O. 208, Dept. of the Mo., 1864; Do. 92, Dept. of Ohio, 1864, in which the death sentence was "disapproved." Other cases of females tried as spies are contained in G. O. 43, 93, 121, Middle Dept., 1864; Do. 102, Dept. of Va. & No. Ca., 1864; Do. 14, Dept. of the Mo., 1865.

6. As in the case of André and that of Palmer, (see *post.*) And compare case in G. O. 8, Mid. Mil. Dept., 1865; also case in Do. 92, Dept. of the East, 1864, where it is announced by Gen. Dix that a certain class of alleged spies will, upon conviction, "be executed without the delay of a single day." In a case in G. O. 58, Dept. of Va. & No. Ca., 1864, it was ordered that the sentence of hanging be executed as near as practicable to the place of the arrest, 'for the purpose of the example.'

fulness or the depravity of his act. The employment of spies is indeed sanctioned by the usages of civilized warfare;[1] and the spy himself may often be an heroic character. A military or other person cannot be required, by an order, to assume the office of spy; he must volunteer for the purpose;[2] and where so volunteering, not on account of special rewards offered or expected, but from a courageous spirit and a patriotic motive, he generously exposes himself to imminent danger for the public good and is worthy of high honor.[3] Where indeed a member of the army or citizen of the country assumes to act as a spy against his own government in the interest of the enemy, he is chargeable with perfidy and treachery, and fully merits the punishment of hanging;[4] but—generally speaking—the death penalty is awarded this crime simply because of the grave harm which it may effect and the peril to which it exposes an army. The spy, proceeding secretly and swiftly, is capable of involving a command in a casualty as serious as it is sudden and unexpected, if he be not forthwith apprehended and summarily disposed of; and, by the law of nations and our own statute, he is condemned to death, "since," as Vattel observes,[5] "we have scarcely any other means of guarding against the mischief he may do us."

1. Vattel, book III, p. 179; Halleck, 406.

2. Halleck, 406, 409; Manual, 270.

3. Note the circumstances of the case of Capt. Nathan Hale. Halleck, 407.

4. In the case, in G. O. 26, Dept. of Va. & No. Ca., 1864, of a U. S soldier convicted as a spy, the accused was sentenced to be hung, and the sentence was approved and executed. Lieut. Palmer, whose sentence was so summarily executed by Gen. Putnam in 1777, was an American who had taken a commission in the service of the enemy.

5. Book III, p. 179.

AMENDMENTS OF THE CODE.

While no general revision of our Code of Articles is necessary, or, it is believed, desirable, yet, as indicated in the course of this Chapter, the same would, in the opinion of the author, be materially simplified and improved by a few amendments, such as the following:—

1. By repealing or dropping as obsolete, or covered by other and better provisions, Arts. 1, 25, 40, 52, 53, 54, 94 and 100.

2. By consolidating Arts. 5 and 14, and by omitting from Arts. 6 and 14 so much as prescribes the penalty of disability to hold office, &c.

3. By striking out in Art. 17 all after the word "accouterments," and substituting—*shall be punished as a court-martial may direct.*

4. By extending and rendering more available the means of redress provided in Arts. 29 and 30, especially the latter.

5. By so modifying Art. 45 as to make it read—"Whosoever relieves the enemy with arms, ammunition, supplies, money, *or other thing*," &c.

6. By omitting from Art. 60 the last clause, making officers and soldiers amenable to military trial after they have become civilians.

7. By placing Art. 62 after the present Art 69, *i. e.* after all the other Articles which provide for the punishment of designated offences, and re-numbering accordingly.

8. By adding to Art. 74 the words—"who shall prosecute in the name of the United States," as also a provision to the effect that the judge advocate shall not accompany the court when it deliberates upon its finding or sentence, and dropping Art. 90 altogether.

9. By amending Art. 86, so as to enlarge the power of courts-martial to punish for contempt, especially in cases of witnesses refusing to testify.

10. By extending the period of the limitation of Art. 103, *as to cases of desertion.*

11. By striking out, in Arts. 104 and 110, the words "whole proceedings" and inserting the word *same*, (referring to the sentence.)

12. By so modifying Art. 113 that it shall conform to the actual practice as indicated by pars. 918 and 919, Army Regulations.

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